

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES**

PHILLIPS 66

and

Case 31–CA–085243

Case 31–CA–096709

**UNITED STEEL, PAPER AND
FORESTRY, RUBBER, MANUFACTURING,
ENERGY, ALLIED INDUSTRIAL & SERVICE
WORKERS INTERNATIONAL UNION, AFL–CIO/CLC**

Nicole Pereira and Simone Gancanyo, Esqs.,
for the General Counsel.

Michael Chamberlin and Julie Ting, Esqs. (Winston & Strawn LLP),
for the Respondent.

Michael Weiner, Esq. (Gilbert & Sackman),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

LISA D. THOMPSON, ADMINISTRATIVE LAW JUDGE. This case was tried in Los Angeles, California, on February 24 through 27, 2014. The trial resumed to conclusion on March 18 and 19, 2014.

On July 12, 2012, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL–CIO/CLC (the USW, Local 534 or the Union) filed a charge in Case 31–CA–085243 against Phillips 66 (Respondent or Phillips 66).¹ This charge was amended on July 25, 2012. On January 18, 2013, the Union filed a charge in Case 31–CA–096709 against Respondent. This charge was amended on March 6 and November 26, 2013, respectively. On November 27, 2013, the Regional Director for Region 31 consolidated both charges and issued a complaint and notice of hearing. On December 10, 2013, Respondent filed its answer, denying all material allegations and setting forth its affirmative defenses to the complaint.

The consolidated complaint alleges that Respondent: (1) violated Section 8(a)(1) of the National Labor Relations Act (the Act) when Respondent made unlawful threats/reprisals to its Health and Safety Shift Specialists (HSS) on January 16 and 19, 2012; (2) violated Section 8(a)(5) of the Act when Respondent failed to bargain in good faith with the Union by bargaining with no intention of reaching an agreement; (3) violated Section 8(a)(5) of the Act by unilaterally implementing its final proposal before reaching impasse; (4) violated Section 8(a)(3) of the Act by retaliating against its HSSs when Respondent

¹ GC Exh. 1A. Abbreviations used in this decision are: “Tr.” for Transcript; “GC Exh.” for General Counsel’s Exhibit; “CP Exh.” for Charging Party’s Exhibit; “R.Exh.” for Respondent’s Exhibit; “GC Br.” for the General Counsel’s Brief; “CP Br.” for the Charging Party’s Brief; and “R Br.” for Respondent’s Brief.

implemented its final proposal that demoted/reassigned the HSSs to other lower paying bargaining unit positions; and (5) violated Section 8(a)(1) of the Act when Respondent promulgated and maintained an unlawful work rule that prohibits employees from speaking to the news media.

The parties were given full opportunity to participate, introduce relevant evidence, examine and cross-examine witnesses, and file briefs. I carefully observed the demeanor of the witnesses as they testified. I have studied the entire record, the post-trial briefs, and the authorities cited therein. Based on more detailed findings and analysis below, I find that Respondent violated the Act as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Santa Maria, California. Respondent is engaged in the business of oil and gas refining, marketing, and transportation. During the 12-month period ending September 25, 2012, Respondent derived gross revenues in excess of \$500,000. During this same time period, Respondent's Santa Maria refinery sold and shipped goods valued in excess of \$50,000 directly from points outside of the state of California. As such, Respondent admits, and I find, that at all material times it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent further admits, and I find, that the following individuals held the positions set forth opposite their names and have been agents of Respondent within the meaning of Section 2(13) of the Act:

Jason Gislason	Superintendent of Operations
Tim Seidel	Site Manager
Jerry Stumbo	Site Manager
Tiffany Wilson	Human Resources Manager

The United Steelworkers Union is a large international union with members in several of Respondent's facilities nationwide. USW Local 534 represents the majority of the employees at the Santa Maria refinery. As such, Respondent admits, and I find that, at all material times, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

1. Overview of Respondent's Operation.

Phillips' Santa Maria, California refinery is an industrialized facility that processes crude oil into other more useful petrochemical products. It operates 24 hours a day, seven days a week. There are 130–135 employees at the facility, and it is one of Respondent's smallest refineries in the United States.

Respondent has a standing collective-bargaining relationship with the Union. The parties' most recent collective-bargaining agreement (CBA) is effective from February 1, 2012 to January 31, 2015. The CBA, by its terms, covers operating, maintenance, and laboratory employees at Respondent's refineries in Los Angeles, Rodeo, and Santa Maria, California. Almost all of Respondent's refineries are unionized and most of the Santa Maria employees are represented by the Union.

Prior to December 10, 2012, there were five HSSs at the Santa Maria facility: Lionel Senes (Senes), Andy Garcia (Garcia), Bernie Gallizio (Gallizio), Alan Lanier (Lanier), and Steven McNeil (McNeil).² As HSSs, they conducted training, permit auditing, fire, CPR, first aid, and annual safety training and procedure reviews. The HSSs also responded to fire, medical, hazmat and gas releases at the facility, and performed emergency medical response (EMT) duties. They also responded to all emergencies at the facility as the Incident Commander. The Incident Command is an emergency management system. If a safety emergency or “incident” occurred within the refinery, the HSS serving as the Incident Commander assumed control over facility operations for the duration of the incident. As Incident Commander, the HSS made all decisions regarding facility operations during the incident and coordinated any safety response required to mitigate potential risks.

The HSSs were also responsible for serving as the Incident Owner. Once the “incident” was safely controlled, as the Incident Owner, the HSS investigated the cause of the incident or near miss at the refinery. At that point, the Incident Owner created incident impact reports where they tracked and documented each incident/near miss at the refinery, ensured that the documentation was accurate and complete regarding the incident, inputted the report into a computerized system (called the incident impact system), and forwarded the incident to the appropriate management official for further handling. Refining incidents rarely occurred, but when they did, they typically lasted for brief periods of time. Only the HSSs served in the role of Incident Commander/Incident Owner. While Respondent’s witnesses testified that the role and duties of the Incident Commander were inherently supervisory, as will be set forth in greater detail below, the HSSs controlled the refinery as Incident Commander solely during the “incident.” Once the incident was sufficiently controlled and documented, a Shift Supervisor took over responsibility for the incident.

The HSSs worked a rotating 28-day shift. A shift set consisted of four 12-hour night shifts with a day off; three 12-hour day shifts with a day off; and three 12-hour night shifts. Afterwards, the HSSs would get a week off in between sets of shifts. The HSSs generally worked 42 hours per week.

Respondent established a detailed management structure at the Santa Maria facility. It maintained a supervisor over each department (i.e., health, maintenance, engineering, operations) who reported to the Site Manager at the facility. Initially, Jeff Patterson was the safety and emergency response supervisor in Santa Maria. He served as the HSSs’ first-line supervisor. At some point, Patterson was demoted as supervisor, and since January 16, 2012, Glen Pericoli (Pericoli) served as the HSSs’ direct supervisor.³

From approximately July 2010 through July 2012, Jason Gislason (Gislason) was the Operations and Technical Superintendent (supervisor) at the Santa Maria refinery. In that role, Gislason was responsible for most of the engineering functions at the refinery. Gislason also oversaw the day to day operations in Santa Maria between Patterson’s demotion and Pericoli’s hiring. He reported to Tim Seidel.

Tim Seidel (Seidel) was the Site Manager at the Santa Maria refinery from early 2010 through February 2012. Seidel was Pericoli’s and Gislason’s supervisor. As Site Manager, Seidel was responsible for the daily operational activities of the refinery, including health, safety, environmental, and maintenance. After being promoted and transferred to Respondent’s facility in Oklahoma, Seidel left in February 2012, and Jerry Stumbo (Stumbo) took over as Site Manager at the Santa Maria refinery.

² Health and Safety Shift Specialists are also called Safety and Emergency Response Specialists and Health and Safety Specialists.

³ The parties stipulated that Glen Pericoli was a supervisor of Respondent within the meaning of Sec. 2(11) of the Act in that he had the authority to engage in at least one of the following: hiring, transferring, suspension, layoffs, recall, promotion, discharge, assignment, reward, or discipline of other employees or responsibility to direct them, to adjust their grievances or effectively to recommend such action, and use independent judgment in the exercise of this authority. See Tr. at. 30.

Rand Swenson (Swenson) was the Site Manager at the Rodeo, California refinery. He also oversaw some of the daily operations in Santa Maria during the early management transitions at the facility. Swenson served as Rodeo’s Site Manager from approximately January 16, 2012 through February 2013.⁴

Tiffany Wilson (Wilson) was the Human Resources (HR) Manager for the San Francisco refinery. In that role, Wilson also performed HR duties for the Rodeo and the Santa Maria refineries. She was responsible for personnel issues at the facilities including labor relations and grievances.

2. Organizing Campaign.

In or around September 2011, the Union began organizing the five HSSs at the Santa Maria Refinery. In early November 2011, Senes, Garcia, Gallizio, Lanier, McNeil, and Union Steward Willie Kerns (Kerns) took a petition to unionize to Seidel. According to Senes, Garcia, Gallizio, and McNeil, Seidel refused to accept their petition but Seidel denied their version of events. However, it is unnecessary to resolve this discrepancy, because it is undisputed that Seidel became aware that the five HSSs intended to vote whether to join the Union.

It is undisputed that, prior to the NLRB election (discussed below), Respondent held several meetings with the HSSs. The first meeting occurred in November or December 2011, at the firehouse at the Santa Maria facility. Senes, Garcia, Gallizio, McNeil, Wilson, and Swenson were present at the meeting. According to Senes, Garcia, and Gallizio, Wilson introduced Swenson to the HSSs. Swenson asked the HSSs why they were unionizing, to which Senes told Swenson that the HSSs were having problems working with Seidel and were unhappy with some of management’s decisions concerning them. Swenson stated that the HSSs “got the company’s attention” by petitioning to unionize and that he wished he had spent more time at the Santa Maria refinery. He went on to state that he was there to work with the HSSs to resolve their issues. While Wilson added that she wished that the HSSs would have contacted her with their concerns, Gallizio replied that he previously emailed Wilson about their concerns but received no response from her.

According to Senes and Gallizio, Swenson then told the HSSs that he had previously run a refinery with only one supervisor, he was not going to do that again, and he was not going to hire any more people. While Senes, Garcia, Gallizio, and McNeil admitted on cross-examination that they were initially mistaken about when this meeting occurred, Swenson was not called to testify and Wilson did not provide any testimony concerning this meeting. Accordingly, Senes, Garcia, and Gallizio’s testimony regarding this meeting stands uncontroverted.⁵

3. Region 31 Decision and Direction of Election.

On November 2, 2011, the Union filed a petition to include the five HSSs at the Santa Maria Refinery in the existing statewide multi-facility bargaining unit. Respondent challenged the

⁴ The parties stipulated that Rand Swenson was a supervisor of Respondent within the meaning of Sec. 2(11) of the Act in that he had the authority to engage in at least one of the following: hiring, transferring, suspension, layoffs, recall, promotion, discharge, assignment, reward, or discipline of other employees or responsibility to direct them, to adjust their grievances or effectively to recommend such action, and use independent judgment in the exercise of this authority. See Tr. at 30.

⁵ While the statements made during this November/December 2011 Swenson meeting were outside the 10(b) period and have not been alleged as independent 8(a)(1) violations, I admitted this testimony as background evidence of Respondent’s alleged anti-union animus. See *East Buffet & Restaurant, Inc.*, 352 NLRB No. 116, slip op at 40 (2008)(citations omitted)(“employer’s statements which cannot form the basis of a finding of an unfair labor practice ‘may be used as background evidence throwing light on...Respondent’s motivation for conduct within the 10(b) period.’”); see also *Sunshine Piping, Inc.*, 351 NLRB 1371, 1387 (2007)(citing *Tejas Electrical Services*, 338 NLRB 416, 416 n.5 (2002))(anti-union statements, even if not themselves alleged to be violations of the Act can be relied on as evidenc to support the employer’s anti-union animus).

appropriateness of the HSSs being included in the bargaining unit based on Respondent’s belief that many of the duties the HSSs performed made them “supervisors” under the Act. However, it is important to note Respondent’s rationale for its belief.

Respondent argued to Region 31 that the HSSs’ duties and responsibilities: (1) as Incident Commander/Incident Owner, (2) training other employees regarding safety issues/use of safety equipment, (3) as company representative in disciplinary situations involving bargaining unit employees and (4) other “supervisory indicia” made them “supervisors” or “supervisory employees” as defined under the Act.

However, in a decision dated December 21, 2011, the Acting Regional Director (ARD) of Region 31 rejected all of Respondent’s arguments and concluded that the HSSs were not supervisors or supervisory employees under the Act.⁶ The ARD’s rationale in this regard is particularly important.

Specifically, with respect to Respondent’s argument that the HSSs are supervisors when they serve as the Incident Commander/Incident Owner (because they are solely responsible for decisionmaking in the facility when an emergency is invoked), the ARD found that emergencies occur infrequently, and as such, the HSSs spent a very small percentage of their overall working time serving in this capacity. Moreover, the ARD noted that the HSSs do not act in a supervisory capacity as the Incident Commander. In fact, Respondent’s own written materials revealed that the HSS perform the Incident Commander role only during the initial stages of the incident, and thereafter, hand over control of the incident to their supervisor. The ARD further found insufficient evidence to conclude that the HSS responsibly directed employees or otherwise acted as a supervisor when serving as Incident Owner.

Regarding Respondent’s argument that the HSSs are supervisors because they train other employees on safety issues, the ARD found that the record proved otherwise. In fact, the ARD determined that the HSSs performed “routine” safety training according to established procedure and the Safety and Emergency Response supervisor was ultimately responsible for establishing the training content and procedure.

Regarding Respondent’s assertion that the HSSs are supervisors because they serve in that capacity during disciplinary meetings, the ARD rejected this argument. Specifically, the ARD determined that:

The record is devoid of evidence that the HSS specialists hire, transfer, suspend, lay off, recall, promote, discharge, discipline employees or adjust their grievances. The only evidence that HSS specialist reward employees is with respect to an incentive program that all employees participate in, whereby any employee can recognize a co-worker for good work, and the coworker receives a small trinket in return. The only evidence of employee discipline involves a situation where an HSS specialist acted as a witness to an employee infraction, which led to that employee’s discipline. There is no evidence that the HSS specialist sought or recommended the employee’s discipline. The discipline was not issued by the HSS specialist. The record is absent of any examples of disciplinary action issued by, or effectively recommended by, HSS specialists towards other employees.⁷

⁶ GC Exh. 13.

⁷ Id. at 20.

Finally, the ARD concluded, contrary to Respondent’s assertions, that there was insufficient evidence to suggest that the HSSs were “supervisory employees” or agents of Respondent based upon other “supervisory indicia.”⁸

Once the ARD’s Decision was issued, it is undisputed that Respondent’s counsel gave Wilson, Seidel, Stumbo, and Gislason his interpretation of the ARD’s findings. However, none of Respondent’s management team personally read the ARD’s Decision. Nevertheless, Respondent appealed the ARD’s Decision to the Board, and the Board declined review.⁹

B. Alleged Pre-Election Threats

1. Alleged Threats to Change/Remove Job Duties and Cut Overtime – January 16, 2012 meeting.

On January 16, 2012, four days before the scheduled election, Respondent held a second meeting with Senes, Garcia, Gallizio, and McNeil at the firehouse at the Santa Maria Refinery. Seidel and Wilson were present for management. It is undisputed that Wilson asked the HSSs if they had any questions for management to which the HSSs stated, “no.” Wilson also conveyed to the HSSs that the purpose of the meeting was to give them information so they could make an informed decision on whether to vote for or against the Union. However, all other aspects of this meeting are disputed.

According to Senes, Garcia, Gallizio, and McNeil, Wilson told them that management felt that certain aspects of their jobs were supervisory which would be taken away from them if they joined the Union. Wilson also told the HSSs that Respondent may not need to have them work a 24/7 shift. Senes recalled that Wilson told the HSSs, because Respondent felt they were supervisors, management would have to look at other aspects of their job duties to see if they were supervisory. Similarly, Garcia recalled that Wilson stated that there would be changes to their jobs if they decided to join the Union because “anything Respondent felt was supervisory would be taken away.”¹⁰

McNeil recalled that Wilson essentially told them that if the HSSs supported the Union, they “might lose their jobs,” some of them would be reassigned to eight-hour jobs, they would no longer have the Incident Commander function, others may come in and perform some of their duties, their vacation schedules might change, and some of them may be transferred to other jobs. According to McNeil, he understood Wilson to say that “[the HSSs] may not have their jobs if they voted for the Union.”¹¹

Lastly, Seidel told the HSSs that Respondent may have to adjust their overtime if they joined the Union and that their job duties would be reviewed to see if Respondent needed them on a 24-hour versus an eight-hour shift which would be a way to minimize overtime.

However, Wilson and Seidel denied saying anything that conveyed any negative consequences for the HSSs voting to join the Union. Specifically, Wilson recalled that she told the HSSs that if they voted to join the union, Respondent would need to engage in bargaining with the Union to discuss their wages, hours, and job duties. She also told the HSSs that management believed some of their duties were supervisory. She further explained that, as part of the discussion about their wages, hours, and job duties, Respondent would need to discuss their duties with the Union because Respondent could not have bargaining unit employees performing supervisory duties. She denied that she ever told the HSSs that

⁸ Id. at 21–23; see also GC Exh. 14.

⁹ GC Exh. 15.

¹⁰ Tr. at 175.

¹¹ Tr. at 496–497.

they would lose their jobs, that their hours, shifts, or overtime would be cut or that anything negative would happen if they voted to join the Union.

5 Likewise, Seidel denied that he made any statements relating to anything adverse happening to the HSSs if they voted to join the Union. Seidel noted that the jest of the meeting was to understand why the HSSs wanted to join the Union and to explain to them the election process. According to Seidel, he wanted to ensure the HSSs were aware of what would need to be negotiated if they decided to join the Union. However, Seidel admitted he told the HSSs that if they voted to join the Union, management
10 would need to discuss their schedules, their rate of pay, and their duties because management believed many of their current duties were supervisory. Seidel denied telling the HSSs that their hours, wages, or overtime would be cut, they would no longer work a 24/7 schedule, or that they would lose their jobs if they voted to join the Union.

15 At this point, it is important to discern precisely what was said by whom during this meeting, a matter that turns on an evaluation of credibility. While this is a close credibility question, I credit Senes', Garcia's, and Gallizio's testimony over that of Wilson and Seidel.

20 First, there is no dispute, based upon all of the witnesses' testimony, that Wilson and Seidel told the HSSs that management felt that certain aspects of the HSSs' job duties were supervisory, and that those duties would need to be reassigned, because Respondent believed they could not have bargaining unit employees performing supervisory duties. In fact, Wilson and Seidel admitted to these statements. I also find that Senes', Garcia's, and Gallizio's testimony was consistent, specific as to the statements made versus generalized assertions, and supported by one another. Although McNeil basically reiterated Senes', Garcia's and Gallizio's testimony about what Wilson and Seidel told them during the meeting, McNeil essentially paraphrased Wilson's and Seidel's statements. Because of this, I will not rely on McNeil's
25 testimony.

30 However, I do not credit Wilson's or Seidel's testimony concerning their statements. Although Wilson and Seidel couched their testimony concerning what they told the HSSs by stating that management "would need to discuss" certain of the HSSs' job duties, schedules, etcetera, with the Union, I find Senes', Garcia's, and Gallizio's version more consistent with Wilson's and Seidel's overall testimony that management felt that some of the HSSs' duties were supervisory, and if so, those duties would need to be removed from them which would necessitate a change in their hours, shifts, and schedules. Most importantly, I found Wilson's testimony on other areas, particularly on cross-examination, evasive and, at times, unbelievable which called into question her overall testimony and credibility.
35

40 Accordingly, I find that Wilson told the HSS that: (1) management felt that certain aspects of their jobs were supervisory which would be taken away from them if they joined the Union, (2) Respondent may not need to have the HSS on a 24/7 shift (because without those supervisory duties, they may not have a business need for the HSS to work a 24/7 shift), and (3) because Respondent felt that the HSSs were supervisors, management would have to look at other aspects of their job duties to see if they were supervisory. I also find that Seidel told the HSS that Respondent may have to adjust their overtime if they joined the Union, and their job duties would be reviewed to see if Respondent needed them on a 24-hour versus an eight-hour shift which would be a way to minimize overtime.

45 2. Alleged Threats – January 19, 2012 Stumbo meeting.

On January 19, 2012, one day before the scheduled election, Respondent held another meeting with Senes, Garcia, Gallizio, and McNeil at the the Santa Maria Refinery. Wilson, Stumbo, and Gislason were present for management.

It is undisputed that, as the new Site Manager at the Santa Maria refinery, Stumbo introduced himself and described his background working for Respondent. However, again, everything else about this meeting is disputed.

According to Senes, Garcia, Gallizio, and McNeil, Stumbo told them that he wanted to mend the relationship between the HSSs and management, but Stumbo denied making this statement at the meeting. Stumbo also told the HSSs that they had a tough decision regarding whether to join the Union, but Stumbo did not testify one way or the other about this statement.

According to Senes, Garcia, Gallizio, and McNeil, Wilson told them that it was management's preference that they vote "no" for the Union and management preferred to deal directly with the HSSs versus through the Union. Wilson also told the HSSs that if they voted against the Union, management would work toward "mending fences" between management and the HSSs. In response, Garcia replied, "So what you're saying is, if we join the Union, you're not going to work with us?" to which Wilson did not respond. Garcia described that there was "an awkward silence" after his statement then Gislason interjected, "What Wilson meant was we can't talk to you, we have to go through the Union."¹²

Regarding the "mending fences" comment, none of Respondent's witnesses denied that Wilson made the remark. Although Gislason denied that Wilson ever said anything to discourage the HSSs from voting for the Union, he never specifically denied that Wilson made the "mending fences" remark.

For her part, Wilson admitted that Stumbo told the HSSs that he wanted to repair the relationship between the HSSs and management. However, according to Wilson, she followed up Stumbo's comment by saying, "if [you] decide to go union, [Respondent] would have a legal obligation to discuss mandatory subjects of bargaining with the Union on your behalf and [Respondent] would be unable to talk directly with you about wages, hours and working conditions."¹³ In response, Gallizio, not Garcia, replied, "So are you saying that you don't want a relationship with us?" to which Wilson responded "no, that's not what I'm saying."¹⁴

Again, it is important to discern what was said by whom during this meeting, which, again, boils down to an evaluation of credibility. Here, I credit Garcia's testimony concerning the statements made at this meeting.

First, Garcia's testimony is consistent with and corroborated by the testimony of Senes, Gallizio, and McNeil. Second, none of Respondent's witnesses refuted Garcia's testimony concerning what Wilson told them, which lends further support toward Garcia's version of the meeting. Third, Wilson admitted on cross-examination that she told the HSSs that management preferred that they vote "no" on unionizing and would prefer to deal directly with them which, again, supports Garcia's testimony. Moreover, as stated above, Wilson's credibility is diminished overall as she was extremely evasive in her testimony during cross-examination, particularly when questioned by union counsel, and only after being instructed to answer a question directly, did she answer counsel's questions.

Fourth, neither Stumbo nor Gislason specifically denied that Wilson told the HSSs that if they voted against the Union, management would work with them to mend fences. Although Wilson testified to a version of this statement by couching it in the content of bargaining with the Union, I find her version

¹² Tr. at 79, 176–177, 456–458, 498–499.

¹³ Tr. at 829–830.

¹⁴ Tr. at 830–831.

incredible. Specifically, if Wilson made the statement which she testified, it defies common sense that Gallizio (according to her version), who has some familiarity with working in a unionized environment, would have misunderstood her remark to such an extent that he would have replied, “So are you saying that you don’t want a relationship with us?” Rather, it seems more logical that Wilson told the HSSs that management would work to “mend fences” if they voted against the Union, which prompted Garcia to respond the way he did. In fact, it is undisputed that the HSSs already told Wilson that they were having difficulties with some of management’s decisions concerning the HSSs (the reason they were considering unionizing) so I find it more reasonable for Wilson to have made the “mending fences” remark against that backdrop. Finally, Garcia’s version of events is particularly believable given that Wilson admitted that she told the HSSs that management preferred that they vote against unionization.

Accordingly, I find that, after Stumbo introduced himself and gave his background, he told the HSSs that: (1) they have a tough decision before them vis-à-vis whether to join the Union, nevertheless (2) he looked forward to working with them to repair their relationship with management. I also find that Wilson then told the HSSs that: (1) management preferred that they vote against the Union, because management preferred to deal directly with the HSSs versus through the Union, and (2) if they voted against the Union, management would work toward “mending fences” between the HSSs and management. I further find that, after Wilson’s remark about “mending fences,” Garcia replied, “so what you’re saying is, if we join the Union, you’re not going to work with us?” to which Gislason interjected, “What Wilson meant was we can’t talk to you, we will have to go through the Union.”

At some point after the Stumbo meeting, Senes documented the discussions between the HSSs and Wilson and Seidel during the January 16, 2012 meeting.¹⁵ According to Senes, he gave his statement to the Union but he was evasive on when he wrote the statement and could not recall when or to whom in the Union he gave the statement. However, none of the other HSSs recalled reporting Wilson’s or Seidel’s statements during the January 16 meeting to anyone in the Union.

C. Alleged Threat of Reprisal

1. January 19, 2012 Gislason meeting.

Immediately after the January 19, 2012 meeting, Senes, Garcia, Gallizio, and McNeil returned to the firehouse to discuss what happened. Again, this is the only fact that is undisputed.

According to Senes, Garcia, Gallizio, and McNeil, several minutes later, Gislason arrived at the firehouse and asked if he could talk to them. Gislason told the HSSs he was concerned about them to which Gallizio replied that he did not like how the meeting went and the HSSs felt that their jobs were being threatened. Gislason replied that their concerns were justified and told the HSSs that everything Wilson and Seidel had previously told them about their jobs was going to happen. Gislason followed up by saying that he was worried about them and their decision to join the Union because Respondent wanted to make their decision to join the Union as undesirable as possible so that other HSSs at other refineries would not vote to join the Union.

Sometime after the Gislason meeting, Senes again documented the discussions during the Stumbo and the Gislason meetings.¹⁶ Although Garcia, Gallizio, Lanier, and McNeil also signed the statement, neither Senes (nor any of the other HSSs) could recall the exact details or circumstances surrounding

¹⁵ R. Exh. 6.

¹⁶ R. Exh. 7.

when or how they signed the statement. While Senes recalled that he gave this second statement to the Union, he could not recall when or to whom in the Union he gave the statement.

5 Gislason vehemently denied the statements attributed to him during this meeting. According to Gislason, he never met with Senes, Garcia, Gallizio, or McNeil after the Stumbo meeting, because he was previously told that the 24-hour period before an election was protected. As such, Gislason made sure that he had no conversations with the HSSs after the Stumbo meeting. Rather, Gislason explained that, after the Stumbo meeting, he returned to his office, stayed there for the remainder of the day and never went to the firehouse that day.

10 After closely reviewing the transcript, I found both the HSSs' and Respondent's witnesses' testimony troubling for several reasons. First, while McNeil's testimony was consistent on direct and cross examination and was corroborated by the testimony of Senes, Garcia, and Gallizio as well as by their signed statement, I find that Senes, Garcia, Gallizio, and McNeil were particularly evasive during
15 cross-examination about when they signed the January 19 statement, to whom within the Union they gave the statement, and the reasons why they did not initially recall or report this meeting. Second, I am particularly troubled by the fact that McNeil recalled *all* the specific details of the Stumbo meeting in his Board affidavit but never mentioned the Gislason meeting that purportedly occurred 10 minutes later.

20 Specifically, McNeil was asked:

Q (by Respondent's counsel): And in that affidavit, you didn't mention anything at all about your meeting with Jason Gislason on January 19th, that you described here today; did you?

A: No.

25 Q: That meeting with Jason Gislason on the 19th, that happened – your testimony was that that happened after a meeting with Jerry Stumbo?

A: Correct.

Q: And you said it was about ten minutes later?

A: Yes.

30 Q: And you said it lasted around 10 or 15 minutes in total?

A: Correct.

Q: And I believe you testified that Jason came down to the firehouse; is that correct?

A: Correct.

Q: Are you certain that happened on the 19th?

A: One hundred percent.

35 Q: And you're absolutely certain that Jason said the things that you said he said?

A: One hundred percent.

Q: No doubt in your mind at all?

A: No doubt in my mind at all.¹⁷

40 McNeil explained that he forgot to mention the Gislason meeting in his Board affidavit because he could not recall all the details of every meeting when asked about them one year after the events occurred. However, I find it unreasonable to believe that, at the time of the Board affidavit, McNeil (and the other HSSs) could recall *all* the specific details of the Stumbo meeting but could not recall *anything* about the Gislason meeting that purportedly occurred 10 minutes later. Most importantly, the heart of the Gislason meeting supposedly confirmed that the alleged threats and reprisals (made by Wilson and Seidel) would
45

¹⁷ Tr. at 508–509.

occur if they voted for the Union. Thus, it stretches the imagination that these types of statements did not trigger anyone's recollection about the Gislason meeting at the time of the Board affidavit.

Moreover, while Garcia described what he recalled of the Gislason meeting in his Board affidavit, he spoke in broad generalities about what occurred. In contrast, Garcia described Respondent's statements during the January 16 and 19, 2012 meetings in specific and concrete terms. In short, I was suspicious of the HSSs' testimony concerning the Gislason meeting.

I also found Gislason's testimony regarding this meeting equally troubling. First, Respondent failed to present any documentary evidence to support Gislason's testimony that he was in his office during the period in question. Second, although Gislason appeared posed and confident during some of his testimony, I found him evasive and inconsistent during other portions. For example, I found Gislason disingenuous when he testified that he specifically recalled what Stumbo told the HSSs about his background (a rather insignificant part of the meeting) but could not recall specifically what Wilson or Stumbo told the HSSs about the election process or what would happen regarding their duties, schedules and wages if they joined the Union (the sole purpose of the meeting).

On balance, however, I conclude that the Gislason meeting occurred and that Senes' and Garcia's version should be credited. First, despite my reservations about certain aspects of their testimony, Senes' and Garcia's testimony was corroborated by each other, Gallizio and McNeil. Most importantly, however, I must credit their testimony over Gislason's because Senes and Garcia were in Respondent's employ at the time of the hearing and testified while management representatives were present. Under these circumstances, their testimony has a special guarantee of reliability, because, by offering evidence that essentially accuses Respondent of wrongdoing, they put their economic security at risk.¹⁸ The HSSs' version is further supported by evidence, which will be discussed in further detail later in this decision, that Respondent implemented a proposal at another refinery that was remarkably similar to the adverse predictions made to the HSSs in Santa Maria. Thus, what Gislason purportedly told them (i.e., that Respondent intends to make their vote difficult so that other HSSs will not vote for the Union) has some basis in fact.

Accordingly, I find that, after the Stumbo meeting, Gislason: (1) met the HSSs at the firehouse; (2) told the HSSs that Respondent intended to follow through on their alleged threats (i.e., to cut their work hours, schedules, and overtime); and (3) Respondent intended to make their decision as difficult as possible in order to discourage them and other HSSs from voting in the Union.

2. Election/Certification

On January 20, 2012, Region 31 conducted an election for the HSSs at Santa Maria Refinery. The HSSs voted 5-0 to join the Union. On January 31, 2012, the Regional Director for Region 31 issued a Certification of Representative certifying the Union as the collective-bargaining representative of employees in the following unit:

Included: All operating maintenance, laboratory employees, and health and safety shift specialists at the Employer's Santa Maria Refinery.

Excluded: All other employees, guards and supervisors as defined in the Act.¹⁹

¹⁸ See *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978).

¹⁹ GC Exh. 16.

D. Alleged Failure to Bargain in Good Faith

1. January 2012 Statewide Bargaining Session

5 It is undisputed that Respondent and the USW met throughout January 2012 in Walnut Creek, California, to negotiate a successor statewide agreement covering employees at Respondent's Rodeo, Santa Maria and Los Angeles refineries. During these negotiations, the Union presented two bargaining proposals to Respondent concerning the Santa Maria HSSs. However, Respondent rejected these proposals because, at that time, the election results for the Santa Maria HSSs had not been certified.²⁰

10 It is also undisputed that, toward the end of the statewide negotiations, Respondent and the Union entered into preliminary discussions about the Santa Maria HSSs before the Union was certified as their bargaining representative. While the Union asked that Respondent promise to retain all five HSSs in their positions, Respondent rejected this offer because management had not yet evaluated how its business and operational needs would be impacted by the decision.

15 However, after further discussions, on January 30, 2012, the parties executed a side letter agreement regarding the HSSs. In so doing, the parties agreed:

20 Within (30) days following ratification of the 2012 Collective Bargaining Agreement, the Company agrees to meet with the Union to commence bargaining related to the Health & Safety Shift Specialists at the Santa Maria Refinery. At the conclusion of the bargaining process, the Company agrees to assign a wage rate of \$32.80 plus NOBP [National Oil Bargaining Pattern Increase] to the Health & Safety Shift Specialist position (title subject to change through the bargaining process). Should any Health & Safety Shift Specialist (title subject to change through the bargaining process) positions be eliminated as a result of the collective bargaining process, the Company agrees not to lay off any impacted employees. The focus of this job classification will remain Health & Safety and will contain Health & Safety job duties.²¹

30 With the January 31, 2012 side letter agreement in place, Respondent and the USW reached a tentative agreement concerning the statewide collective-bargaining agreement on January 31, 2012. The statewide contract was ratified on February 1, 2012.²² Although the parties were required to begin negotiations about the HSSs, they agreed to postpone discussions for several months until after Respondent's turnaround was completed.²³

35 During the time between February 2012 and when the bargaining sessions began (in May 2012), Respondent began reviewing the duties and responsibilities of the HSSs in light of the ARD's Decision and the HSSs' election. In determining whether the HSSs performed any supervisory duties, Wilson believed the Incident Commander/Owner function was supervisory in nature. According to Wilson, she was told by counsel that the ARD found that the HSSs did not spend a sufficient amount of time performing the Incident Commander/Owner and other supervisory indicia-type duties to be considered supervisors. However, Wilson admitted that she never read the ARD's Decision which, in reality,

45 ²⁰ R.Exhs. 31–32.

²¹ GC Exh. 18.

²² GC Exh. 17.

²³ A "turnaround" occurs when an operating unit is completely shut down for full scale maintenance. A turnaround requires the participation of all personnel at the refinery, including Union representatives.

specifically found insufficient evidence that the Incident Commander/Owner function or various others duties performed by the HSSs were supervisory in nature.

5 Nevertheless, Wilson asked Stumbo to examine the HSSs' job duties to determine if any of their duties were supervisory. Stumbo consulted with Supervisor Pericoli and they reviewed all of the HSSs duties. Despite that the ARD concluded otherwise, Stumbo concluded that the Incident Commander responsibility was a supervisory function which should be removed from the HSSs. According to Stumbo, one of the primary reasons for having the HSSs work a 24/7 shift was due to their responsibility to serve as Incident Commander. With this function removed, Stumbo concluded that the HSSs' remaining duties did not warrant 24/7 shift coverage. Stumbo further determined that the HSSs' remaining duties could be performed on an eight-hour day schedule, so he concluded that Respondent only needed one full-time employee to perform the remaining HSSs duties. It is undisputed that Stumbo had not read the ARD's Decision during this time period.

15 Accordingly, despite that the ARD concluded that there was insufficient evidence that the Incident Commander/Owner and EMT duties were supervisory in nature, Respondent, at minimum, misinterpreted the ARD's findings and drew its own conclusions on the HSSs' duties it believed were supervisory. This decision would prove fatal for Respondent.

20 2. May-November 2012 Bargaining

From May to November 2012, the parties engaged in eleven bargaining sessions and exchanged several proposals regarding the terms and conditions of employment for the HSSs. For the majority of the sessions, Field Director of Local 675 Gary Holloway (Holloway), International Union Representative Ron Espinoza (Espinoza), Committee Member Steve Swader (Swader), Garcia, Refinery Committee Member Richard Wingert (Wingert) and Committee Member Bryan Sawtelle (Sawtelle) represented the Union. Wilson and Los Angeles HR Manager Pam Morgan (Morgan) represented Respondent. Mike Welsh (Welsh) served as counsel for management, but he was later replaced by John McLachlan (McLachlan). Gislason also participated in the early session until around July 2012 when he moved to Houston. All of the bargaining sessions took place the Hilton Garden Inn in Santa Maria.

30 It is undisputed that, throughout all of the bargaining sessions, neither party moved from their original positions vis-à-vis the Santa Maria HSSs. Specifically, Respondent's position was essentially that, in reviewing all of the HSSs responsibilities, Respondent believed that the Incident Command function was supervisory in nature, which accordingly, did not belong in the bargaining unit position. Because the Incident Command function necessitated having five HSSs work on a 24/7 shift, without this function, Respondent determined that changes to the HSSs position were necessary because Respondent did not have a business need to maintain all five HSSs performing work on a 24/7 shift.

35 In contrast, the Union's position was essentially to keep all five HSSs in place with all of their duties they maintained prior to the election. To the extent that the HSSs duties without the Incident Command function did not warrant a 24/7 shift, the Union attempted to negotiate duties to include to the HSSs position in order to maintain the 24/7 shift coverage.

40 a. May 2012 Bargaining Sessions

45 It is undisputed that the parties spent the bulk of the May negotiations discussing the HSSs' job duties. In this regard, Respondent presented a proposal for discussion that listed all of the HSSs duties it

believed should be part of the bargaining unit position.²⁴ Because Respondent believed it needed to remove any duty it felt was supervisory in nature, Respondent proposed, the parties discussed and ultimately exchanged documents concerning the job duties for a newly created bargaining unit position called the Health and Safety Coordinator (HSC) which would replace the HSS position.²⁵ The HSC position was essentially a bargaining unit position that included what Respondent believed were the HSSs remaining nonsupervisory duties.

Wilson explained to the Union that, with the removal of what Respondent believed were the HSSs' supervisory duties (i.e., the Incident Command/Owner duties), there was no business justification to have HSSs on 24/7 shift coverage. Without the necessity of 24/7 shift coverage, Wilson explained it was no longer necessary to have five HSSs.

Respondent also proposed reassigning the HSSs' EMT duties. In that regard, Respondent explained that, while it believed that these duties were not supervisory in nature, it envisioned having outside contractors perform EMT duties, because Respondent believed it needed certified EMTs on a 24/7 basis at the refinery.

For its part, the Union strongly maintained that all five of the HSS should remain on shift. Regarding the alleged "threats," while Holloway was generally aware of the alleged threats and reprisals made by management during the January 16, the Stumbo and the Gislason meetings, he was extremely evasive regarding when he became aware of the threats, who told him about the threats, and whether he had received the HSSs statements by the May 2012 negotiations. Nevertheless, it is undisputed that no one raised the alleged threats during these negotiations.

b. June 2012 Bargaining Sessions

It is undisputed that there was little movement in the parties' positions during the June bargaining sessions. Initially, the parties discussed the job duties outlined in General Counsel's Exhibit 22 and who would be performing which job. Respondent proposed a list of duties for the HSC position, which did not include the Incident Command/Owner or EMT functions.²⁶ The Union presented a counterproposal, which essentially called for five HSC/HSS to perform the same job duties, including the Incident Command/Owner function, as they previously performed on a 24/7 shift schedule.²⁷

In response, Respondent countered by proposing the creation of two HSC positions (versus one HSC as previously recommended by Stumbo) that would be staffed on an eight hour day schedule, at an Operator 2 wage rate of \$32.80 per hour. This wage rate was less than what the HSS were earning as salaried employees. The three remaining HSSs would be transferred to the Operations department.²⁸ While Respondent believed that it had no business justification to employ five bargaining unit HSS on a 24/7 shift without the Incident Command/Owner function, the Union rejected Respondent's proposal, asserting that other nonsupervisory duties could be performed on a 24/7 basis that justified employing all five HSSs. Because of this stalemate, the parties shifted their discussions toward filling open positions and job protection for the HSS. The parties exchanged proposals in that regard and ultimately reached a tentative agreement regarding seniority in the event that any of the HSSs were displaced.²⁹

²⁴ GC Exhs. 2, 21–22.

²⁵ GC Exh. 20.

²⁶ GC Exh. 48.

²⁷ GC Exh. 23.

²⁸ GC Exh. 24.

²⁹ GC Exhs. 28.

Accordingly, by the end of the June 2012 sessions, it is undisputed that the parties remained at odds over: (1) whether the HSS position warranted 24/7 coverage, and (2) the number of individuals needed to perform the position. Moreover, there was no mention of the alleged threats or reprisals made by Wilson or Seidel.

c. July 2012 Bargaining Sessions

The parties did not move substantially off of their respective positions during the July 2012 negotiations. However, in an effort to compromise, the Union proposed to have four HSS on a 24/7 shift schedule and one HSC on a day schedule to provide relief coverage.³⁰ However, Holloway admitted that this proposal was no different than the status quo—i.e., five HSS on a 24/7 shift schedule which consisted of four HSS working a 24/7 shift and one HSS providing relief coverage.

In response, Respondent essentially maintained its position – i.e., to have two HSC on an eight hour day schedule, with the remaining three HSS transitioning into Operations. However, Respondent also proposed providing 13 weeks of wage protection for any of the HSSs who would be transferred to the Operations department.³¹ The Union rejected both of Respondent’s proposals. At this point, Union referred to and gave Respondent a copy of the ARD’s Decision to support their position that the Incident Command/Owner function was not supervisory in nature (or any of the other duties Respondent believed were supervisory), thus, the HSSs duties need not be removed from them. However, Wilson never read the specifics of the ARD’s rationale during the July negotiations, and as such, the parties maintained their respective positions.

After Respondent’s proposals were rejected, it is undisputed that, during the July 5, 2012 session, the Union told Respondent about the alleged threats of reprisals made by Gislason if the HSSs joined the Union. Holloway also read the HSSs’ written statements to Respondent. Although Holloway was aware of the alleged threats prior to July 5, he told Respondent about the alleged threats during this session because, according to him, it was during this session when it became clear to the Union that Respondent intended to carry out their threats. However, I found Holloway’s testimony evasive and inconclusive on this point.

Nevertheless, after learning of the alleged threats, Wilson asked Gislason whether he made any threatening statements or remarks that could be construed as threats to the HSSs. Gislason denied making any such statements.

With no significant movement in negotiations, the Union redirected the discussion and proposed that Respondent apply its annual salary adjustment to the HSSs. While Respondent disagreed that the HSSs were now eligible for the increase (because they were now considered bargaining unit versus salaried employees), because they were salaried employees prior to the election, Respondent agreed that the HSSs would receive the adjustment.³²

Accordingly, at the end of the July 2012 bargaining sessions, the parties’ positions essentially remained unchanged. The Union proposed to keep all five HSS on a 24/7 shift schedule but without the

³⁰ GC Exhs. 29, 31.

³¹ GC Exhs. 30, 51.

³² GC Exh. 31.

Incident Command/Owner function, and Respondent proposed to create two HSC positions and move the remaining three HSS into Operations at their HSS salary for 13 weeks.

As a result of the continued stalemate between the parties, in a letter dated July 6, 2012, Wilson expressed concern about the slow pace and lack of progress in the negotiations and urged the Union to spend more time negotiating over the issues regarding the HSSs.³³

d. August 2012 Bargaining Session

During the August bargaining sessions, the parties basically regurgitated their previous positions. The Union again proposed to keep all five HSS on a 24/7 shift schedule, except the HSS would not perform the Incident Command/Owner function or assume a leadership role. However, this time, the Union requested that the HSSs receive a lump sum payment.³⁴ Respondent accepted that the HSS would not assume a leadership role and agreed to the lump sum payment on the condition that the Union agree to accept two HSC positions on an eight hour day shift schedule and move the three remaining HSS into Operations with wage rate protection.³⁵ As such, neither party substantially moved from their original positions.

Near the end of the August negotiations, the Union suggested that Garcia review all of the duties of the HSSs and suggest additional duties that the HSSs could perform to justify maintaining round the clock coverage. Respondent agreed to consider Garcia's suggestions.

e. September 2012 Bargaining Sessions

Again, the parties made little progress in negotiations during the September bargaining sessions. Although Garcia suggested additional duties that could justify maintaining 24/7 coverage, Respondent determined that none of the additional duties provided a legitimate basis to employ five HSS on a 24/7 shift.³⁶ Accordingly, Respondent again proposed to assign two HSC and pay them at the Operator 2 rate and move the remaining three HSS to Operations at the Operator 2 rate. The Union was required to respond to the proposal by September 16, 2012; otherwise, Respondent's proposal would become effective.³⁷

Once the parties reconvened for another bargaining session, the Union essentially stood on their original position, i.e., to add the HSC to the CBA, as a 24/7 shift position, and maintain all the job duties performed by the HSSs except that of Incident Command/Owner.³⁸ Respondent rejected this proposal.

At some point, Respondent suggested and the parties discussed an agreement reached between Respondent and the Union regarding the HSSs at Respondent's Alliance refinery in Louisiana. There, Respondent and the Union agreed to a proposal whereby, after the Alliance HSSs' unionized, three HSS became HSCs on an eight hour day schedule and two HSS were transferred into Operations. However, this proposal was not acted upon.

³³ GC Exh. 70.

³⁴ GC Exhs. 34, 36.

³⁵ GC Exh. 37.

³⁶ GC Exh. 76.

³⁷ GC Exh. 52.

³⁸ GC Exh. 38.

Meanwhile, Respondent again proposed to have two HSCs work an eight hour day schedule, (which two HSCs to be determined by the Union), and transfer the remaining three HSS into Operations.³⁹ Sometime later, Respondent outlined the HSCs' duties, how many HSSs would become HSCs, how many would move into Operations, and their respective wage rates.⁴⁰ However, in this proposal, the HSSs moving to Operations would receive the Basic Trainee rate of \$23.30 per hour versus the Operator 2 rate as previously proposed.⁴¹ Although the Union rejected this proposal and told Respondent's team that they were following through on the alleged threats to punish the HSSs for unionizing, Respondent withdrew the previously proposed Operator 2 wage rate when the Union failed to respond by the September 16, 2012 deadline. In any event, Respondent denied making good on any alleged threats against the HSSs.

Accordingly, by the end of the September negotiations, the parties' positions still remained unchanged. There were no bargaining sessions in October.

3. October 26, 2012 Letter

On October 26, 2012, Respondent sent a letter to the Union reiterating the business justifications for its bargaining proposals.⁴² Respondent again explained to the Union that it determined that the Incident Command function was supervisory because, during an emergency, the Incident Commander/Owner would outrank the Plant Manager. As such, Respondent could not have a bargaining unit employee serving in that role. Therefore, according to Respondent, the Incident Owner duties needed to be assigned to a supervisor to avoid a potential conflict of interest where a bargaining unit HSS may be required to investigate a fellow bargaining unit employee. Again, this rationale was directly contrary to the ARD's findings.

Respondent further noted that, with the removal of all of the supervisory aspects of the HSSs' duties, it no longer justified keeping all five HSSs on 24/7 shift schedule. Respondent further explained that the EMT duties were never a necessary job function for the HSSs, and as such, could be filled by other means. Interestingly, Respondent's letter noted, "now that they [the HSSs] have made that choice [to join the Union], the Company must make appropriate changes to its operations to ensure supervisory duties are performed by supervisors; this merely reflects the necessary changes which are legitimate and logical consequences of that choice."⁴³

4. November 18, 2012 Bargaining Session and Respondent's Final Offer

The parties held another bargaining session on November 18, 2012. Wilson explained to the Union that Respondent's team felt the parties were at impasse because, after numerous sessions, neither had essentially moved from their respective positions. To that end, Respondent presented its final offer, which reflected their overall position. In short, Respondent (again) proposed two HSCs work an eight hour day schedule and perform most of the HSS's duties except the Incident Owner/Command and EMT functions. Respondent proposed to transfer the remaining three HSSs into Operations at the Operator 1 wage rate. The Union was required to respond by November 26, 2012.⁴⁴ McLaughlin, Respondent's counsel, told the Union that there was room for movement if the Union agreed to the two HSCs, but

³⁹ GC Exh. 54.

⁴⁰ GC Exh. 39.

⁴¹ Id.; see also GC Exh. 52.

⁴² GC Exh. 56.

⁴³ Id.

⁴⁴ GC Exh. 40.

Holloway reportedly responded, “Don’t hold your breath.” For his part, Holloway was evasive and inconclusive in confirming this remark, stating, “I may have said that. I don’t remember.”⁴⁵

5 Following these negotiations, the Union requested an extension of time to respond to Respondent’s proposal to which Respondent granted.⁴⁶ However, in a letter to Respondent dated December 4, 2012, the Union rejected Respondent’s final proposal.⁴⁷ While the Union explained that it did not believe the parties were at impasse, the Union did not offer any additional proposals.⁴⁸

10 Respondent sent a response letter to the Union reiterating its position that there was no business justification for five HSS on a 24/7 shift and its belief that the parties had reached impasse in negotiations. Respondent informed the Union that, as a result of the impasse, it intended to implement its last and final offer effective on December 10, 2012.⁴⁹

15 It is undisputed that the Union never passed a proposal that accepted less than five HSS working a 24/7 shift schedule and Respondent never passed a proposal that accepted more than two HSC working an eight hour day schedule and three other HSS transitioning to Operations.

E. Unilaterally Implemented Final Proposal

20 On December 10, 2012, Respondent unilaterally implemented its November 18, 2012 final offer.⁵⁰ Senes and Garcia, the two most senior HSSs, were reassigned as Health and Safety Coordinators. They performed duties set forth in General Counsel’s Exhibit 40.⁵¹ As HSCs, they no longer served as Incident Commander/Owner or performed EMT duties at the refinery. They also worked the day shift versus a 24/7 shift schedule.

25 Gallizio, Lanier, and McNeil, the less senior HSSs respectively, were reassigned to the Operations department. After completing probationary training, they became entry level Operators, working a 12-hour rotating shift schedule, earning the Operator 1 rate of \$23.50 per hour. As Operators, Gallizio, Lanier, and McNeil oversaw decoking procedures, cleaned process areas, signed maintenance work orders, locked out equipment prior to maintenance, and wrote job orders to repair equipment.⁵²
30 Gallizio, Lanier, and McNeil also served as junior members of the Emergency Response Team, along with 30 other operators.

35 As an Operator, Lanier earned approximately \$20,000 less per year versus when he was a HSS. However, as a HSS, Lanier worked approximately 100 hours on his off days. McNeil held the least seniority of all of the HSSs.

40 As an Operator, McNeil worked limited overtime in 2013 and earned approximately \$26,000 less per year less versus when he was a HSS. Because of his juniority, McNeil was given the last choice in

⁴⁵ Tr. at 316, 395, 940–941.

⁴⁶ GC Exhs. 40–42.

⁴⁷ GC Exh. 44.

⁴⁸ Id.

⁴⁹ GC Exh. 45.

⁵⁰ GC Exh. 40.

⁵¹ Id.

⁵² Decoking is the process of disposing of crude oil by turning it into a granulated type product so it can be safely transported off site.

vacation schedules. As a result, in October 2013, McNeil resigned to take a job as a full-time firefighter with the Diablo Canyon Nuclear Power Plant.⁵³

5

F. July 2013 Discussions

On or about July 1, 2013, the parties began additional discussions concerning the HSSs. At that time, the Union proposed to reduce the number of HSSs from five to two and drop the 24/7 shift coverage requirement. However, the Union demanded a higher wage rate for the HSC and a retroactive wage increase for the remaining three HSS who were reassigned into Operations.⁵⁴ Respondent rejected this proposal. Although the parties continued discussions, they were unable to come to an agreement and negotiations resulted in impasse.

10

G. News Media Policy

15

On December 10, 2012, Stumbo sent an email to all Phillips 66 employees at the Santa Maria Refinery. The email stated:

20

With the recent supply and demand issues in California, and the resulting price increases, it is extremely important for all employees and contractors to not speak to the news media about our operations. Confidentiality is a condition of employment and I urge you to not speculate on market conditions or refinery operations.

Please be aware of the following guidelines.

25

News Media Guidelines

30

If a Phillips 66 employee or on-site contractor is contacted by a member of the news media, no information exchange is permitted concerning Santa Maria or Rodeo Refinery operations. It is against company policy for anyone but an authorized company spokespersons (sic) to speak to the news media. This is to ensure that our company's communications to the public are aligned and consistent, and that they are factual and meet all legal and business confidentiality requirements. All media inquiries are to be referred to the designated site spokesperson. Please refer all calls to Kristen Kopp. If you have any questions, please contact your supervisor.⁵⁵

35

III. DECISION AND ANALYSIS

A. Impermissible Threats and Threats of Reprisals

40

The first issue in this case is whether Respondent violated Section 8(a)(1) of the Act when it threatened to remove certain job duties, and cut work hours and overtime if the HSSs voted to join the Union. Based upon the evidence, I conclude Respondent violated the Act as alleged.

1. Parties' Positions

45

⁵³ There was no claim in counsel for the General Counsel's or counsel for the Charging Party's brief that McNeil was constructively discharged due to his demotion/reassignment by Respondent.

⁵⁴ R. Exh. 45.

⁵⁵ GC Exh. 46.

Citing the U.S. Supreme Court’s decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and the Board’s decisions in *Poly-America, Inc.*, 328 NLRB 667 (1999)(citations omitted) and *Noah’s Bay Area Bagels, LLC*, 331 NLRB 118 (2000), counsel for the General Counsel (CGC) asserts that Respondent’s statements to its HSSs regarding the effects of unionization violate Section 8(a)(1) of the Act because they were coercive threats and/or promises of benefit intended to interfere with/restrain the HSSs from exercising their Section 7 rights. Respondent denies it violated Section 8(a)(1) and maintains that it: (1) made lawful predictions about the potential effects of unionization on the HSSs’ jobs; (2) made no promises of benefit but conveyed its legal obligations to bargain with the Union; and (3) made no threats of reprisals against the HSSs for joining the Union.

2. Prevailing Legal Authority

Under *NLRB v. Gissel Packing Co.*, an employer’s predictions of adverse consequences as a result of unionization are either coercive threats in violation of Section 8(a)(1) or lawful expressions about unionization, which are protected by Section 8(c) of the Act. To determine the difference, the proper inquiry is whether, based upon the totality of the circumstances, the employer’s prediction is “carefully phrased on the basis of objective fact to convey the employer’s belief as to demonstrably probable consequences beyond his control.”⁵⁶ If so, the statement is considered a reasonable prediction of adverse consequences resulting from unionization and is lawful free speech under Section 8(c) and the First Amendment.

On the other hand, if there is any implication that the employer will take action solely on its own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction but a threat of retaliation. These types of statements are not protected by Section 8(c) or the First Amendment, rather they are unlawful coercive threats that violate Section 8(a)(1).⁵⁷ When analyzing alleged unlawful statements, the Board “view[s] employer statements from the standpoint of employees over who the employer has a measure of economic power,”⁵⁸ because it “take[s] into account the economic dependence of the employees on their employers, and the necessary tendency for the [employee], because of that relationship, to pick up intended implications of the [employer] that might be more readily dismissed by a more disinterested ear.”⁵⁹ Thus, for example, where an employer predicts that unionization will result in a loss of benefits when there “is no lawful explanation based on objective facts as to why [the] loss of a benefit would occur,” the employer’s statement violates the Act.⁶⁰ In short, the trier of fact must assess, under the totality of the circumstances, whether the employer conveyed what “could” occur if employees unionized (which would be lawful predictions) versus what “would” occur (which would be unlawful threats).

3. Analysis

First, I must determine whether Respondent’s statements to the HSSs on January 16 and 19, 2012, were impermissible threats. With respect to the January 16, 2012 statements, the CGC alleges that Respondent’s remarks to the HSSs that unionization would result in the loss of/changes to their duties, work hours and schedules constitute unlawful threats, because there was no lawful reason based on any objective fact to explain why these changes would occur. I agree.

⁵⁶ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 589, 618 (1969).

⁵⁷ *Id.*

⁵⁸ *Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 3 (2014) (citing *Mesker Door*, 357 NLRB No. 59, slip op. at 5 (2011)).

⁵⁹ *Id.* (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. at 617).

⁶⁰ *Poly-America, Inc.*, 328 NLRB 667, 669 (1999), *affd.* in relevant part *Poly-America, Inc. v. NLRB*, 260 F.3d 465 (5th Cir. 2001); see also *Noah’s Bay Area Bagels, LLC*, 331 NLRB 188, 188 (2000).

Specifically, regarding Wilson’s statements, as I previously found in the statement of facts, the credited testimony shows that Wilson told the HSSs that management believed certain of their job duties *were* supervisory which *would* (not could) be removed if they joined the Union. To that end, I credited Senes’, Garcia’s and Gallizio’s testimony regarding what Wilson told them during the meeting, because they corroborated each other’s testimony and they spoke in specific and concrete terms versus broad generalities. Relying on a typewritten document by McNeil, Respondent contends that McNeil’s statement confirmed that Wilson told the HSSs that their duties *might* change if they voted for the Union.⁶¹ However, other record evidence does not bear out Respondent’s version of the meeting. In fact, further down in McNeil’s statement, McNeil wrote that Wilson told the HSSs that they “*would* no longer be the IC [Incident Commander],” “*would* lose our ‘Incident Owner’ status for Impacts,” “*would* lose many of our job requirements because they were ‘management’ jobs that the company could not ‘lose’ to the Union,” “*would* lose flexibility in scheduling vacations . . .,” and “once [the HSSs] chose to vote Union we *would* never be able to change back.”⁶² Even though McNeil indicated that Wilson’s (and Seidel’s) remarks were “artfully worded,” McNeil’s overall impression of the meeting was that: (1) Respondent was trying to “scare [the HSSs] out of going Union,” and (2) the meeting was “not ‘informational’ . . . as Wilson stated . . . but one . . . laced with veiled threats disguised as concern for our ‘well being.’”⁶³

Moreover, it is important to consider the circumstances surrounding when Wilson’s (and Seidel’s) statements were made – i.e., in a small office, where the discussion concerned the HSSs livelihood, four days before a vote to join the Union. Thus, viewing Respondent’s statements “from the standpoint of employees over whom the employer has a measure of economic power,” and the “necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear,”⁶⁴ I find it reasonable to conclude that Wilson’s statements, made just four days before the election, impermissibly implied that the HSSs’ job duties, schedules, and work conditions *would* change if they voted in favor of the Union.

The CGC also avers that Wilson’s statements concerning the removal of the HSSs’ alleged supervisory duties were impermissibly coercive as her statements were not based on objective facts beyond Respondent’s control, but rather, on Respondent’s own (self-serving) opinion of the supervisory nature of those duties. Again, I agree.

Respondent argues that Wilson made valid predictions about the potential removal of certain of the HSSs’ supervisory duties, because those predictions were based upon and “flowed from the objective findings in the ARD’s determination that the HSSs were not supervisors.”⁶⁵ However, the undisputed evidence shows that Respondent, at best, misinterpreted the ARD’s findings and drew on its own inaccurate conclusions when it made its predictions. Specifically, the ARD determined that the alleged supervisory duties on which Respondent relied – i.e., the HSSs role as Incident Commander/Incident Owner and during disciplinary meetings – were *not* supervisory in nature. Yet, despite these findings, Respondent determined, on its own, and subsequently insisted that the HSSs role as Incident Commander/Incident Owner and their role during disciplinary meetings *were* supervisory. In fact, at the the hearing, Wilson admitted she was unfamiliar with any of the specific findings made by the ARD, and that she had not even read the decision prior to the January 16 meeting.

⁶¹ R. Exh. 9.

⁶² R. Exh. 9.

⁶³ Id.

⁶⁴ *Gissel*, 395 U.S. at 617; see also *Mesker Door*, 357 NLRB No. 59, slip op at 5 (2011).

⁶⁵ R. Br. at 24–25.

Moreover, while Wilson believed that HSSs served as supervisors during disciplinary meetings, she could not name one occasion where the HSSs initiated discipline or played any type of supervisory role during those meetings. Incredibly, the HSSs role as supervisors during disciplinary meetings is not contained anywhere in their position description. Finally, Wilson admitted that Respondent maintains the exclusive right to assign/reassign duties upon which Respondent was not required to bargain. Therefore, the reassignment or removal of the alleged “supervisory” duties was within Respondent’s complete control. In sum, the record does not provide any support for Wilson’s predictions that Respondent may/might/would have to remove certain “supervisory” duties if the HSSs unionized. Rather, Respondent’s prediction is unsupported by objective evidence, and accordingly, not protected as a lawful expression of opinion under Section 8(c).⁶⁶

Regarding Seidel’s comments that Respondent may have to adjust/cut the HSSs’ shifts, schedules workhours and/or overtime if they joined the Union, the CGC claims that these statements were coercive threats based on the Board’s decision in *Hertz Corp.*, 316 NLRB 672 (1995). In that case, the company held a captive audience meeting with employees immediately prior to the union election. During the meeting, management told employees that if the union was voted in, represented employees may not have their 401K plan benefits, but all pay and benefits were negotiable, and the company would bargain with the union in good faith.⁶⁷ However, immediately after these statements, management also told employees that they “should be aware that out of 197 or so contracts that . . . Hertz . . . has presently [negotiated with the union], none of those contracts have a 401(K) plan.”⁶⁸ Hertz argued that its statements regarding the 401(K) plan were lawful since employees were told that: (1) the 401(K) plan was a negotiable item, (2) employees may gain, lose or get the same in pay and benefits as a result of negotiations, (3) Hertz would bargain with the union in good faith, (4) no changes had been made in employees benefits during the negotiations, and (5) employees do not automatically lose a benefit if they vote for the union.⁶⁹

However, the Board adopted the judge’s findings that the company’s statements were unlawful. The judge noted that, given the totality of the company’s statements about the 401(K) plan which was immediately followed by the statement that no union had ever been successful in negotiating a 401(K) plan for its represented employees, employees “could reasonably and strongly assume that if they voted for the union, either coverage of employees would automatically be withdrawn . . . or that negotiations for continued coverage under the plan would be futile and unsuccessful.”⁷⁰ In short, the Board adopted the judge’s findings that the employer violated the Act if it made statements that gave the impression that benefits will automatically be lost as soon as employees become represented by a union.⁷¹

Like in *Hertz Corp.*, Respondent argues that the HSSs were told that their schedules and hours “might” change but their schedules would have to be bargained with the Union. However, also like *Hertz Corp.*, Seidel’s statement about reduced schedules, hours, and overtime was immediately preceded by Wilson’s comment that: (1) management felt that certain aspects of the HSSs jobs were supervisory (despite that the ARD determined they were not) which *would* be taken away from them if they joined the Union, and (2) with those supervisory duties removed, Respondent may not need to have the HSSs on a 24/7 shift. I find that these statements taken together gave the impression that the HSSs shifts, schedules, and hours would be lost if they voted for the Union.

⁶⁶ See *UPS Supply Chain Solutions, Inc.*, 357 NLRB No. 106, slip op at 4 (2011).

⁶⁷ *Hertz Corp.*, 316 NLRB at 695–696.

⁶⁸ Id. at 696.

⁶⁹ Id. at 695.

⁷⁰ Id. at 696.

⁷¹ Id., see also *Niagara Wires*, 240 NRB 1326 (1979) (citations omitted).

Respondent also relies on the Board’s decision in *Wild Oats Markets, Inc.*, 317 NLRB 717 (2005), to support its position that predicting potential loss of benefits in collective bargaining is lawful if it is a factually accurate observation of a potentially negative outcome of unionization.⁷² However, in *Wild Oats Markets, Inc.*, the Board found that the company’s flyer to employees which stated, “in collective bargaining you could lose what you have now” *considered by itself*, constituted a factually accurate observation regarding a possible negative outcome of collective bargaining.⁷³ Contrary to the situation in *Wild Oats*, Seidel’s statement was not made in a vacuum; rather, it was preceded by Wilson’s comment that certain of the HSSs’ duties, which Respondent believed were supervisory, *would* be removed if they joined the Union. Thus, while Seidel’s statement, by itself, may have been a lawful prediction, his statement combined with Wilson’s remarks together with the timing of both statements (made four days before the vote), reasonably inferred an impermissibly coercive threat.

Finally, I am further persuaded as to the coercive nature of Seidel’s remarks given that the Board previously found that Respondent unlawfully threatened a lead operator at its Sweeney refinery when Respondent told him it would make the lead Operator a salaried position, which would cut his and his coworker’s pay, if employees voted for the Union.⁷⁴ Accordingly, I find that Respondent violated Section 8(a)(1) of the Act when it threatened to remove certain “supervisory” duties from the HSSs and adjust/cut their schedules, work hours and overtime if they voted for the union.

I also conclude that Wilson’s “mending fences” remark made during the January 19 Stumbo meeting was unlawful. On this point, Respondent argues that Wilson never told the HSSs that, if they voted against the Union, Respondent would work to “mend fences” between the HSSs and management. However, the credited testimony shows, and I previously found otherwise. Alternatively, Respondent avers that, even if Wilson made the remark, her statement was not a promise of any benefit but rather a statement conveying Respondent’s legal obligation to refrain from discussing mandatory subjects of bargaining directly with the HSSs. I disagree.

In *Purple Communications, Inc.*, the Board addressed whether comments made by the company’s CEO to employees constituted an impermissible pre-election implied promise of benefit.⁷⁵ In that case, the company CEO held several captive audience meetings with employees where he discussed several issues, including the company’s increased productivity standards which took effect immediately prior to the union election. However, during the speech, the CEO also told employees that the company “may have gone too far [with the increased production standards]” and that the company “[was] looking at the matter” and “needed to recalibrate” the standards. While the judge found the comments lawful generalized expressions of campaign propaganda, the Board reversed finding that the statements were an “implied promise of improvement,” because the CEO’s comments were “directly linked to the recently increased productivity standards” which served as one of the central campaign issues for the Union.⁷⁶

Like the Board in *Purple Communications*, I decline to find that Wilson’s “mending fences” comment was a generalized expression of Respondent’s duty under the Act. Rather, her statement was directly linked to the tumultuous relationship between the HSSs and management—one of the central reasons why the HSSs considered joining the Union in the first place. Moreover, Wilson’s “mending fences” remark was made immediately after she told the HSSs that management preferred they vote “no”

⁷² 344 NLRB 717 (2005).

⁷³ *Id.* (emphasis added).

⁷⁴ See *Phillips 66 Sweeney Refinery*, 360 NLRB No. 26, slip op. at 1 (2014).

⁷⁵ See *Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 3–4 (2014).

⁷⁶ *Id.*

for the Union, which lends additional coercive meaning to her statement. Thus, the context in which both statements were made raises a reasonable inference that Wilson was offering something of benefit (mending fences between the parties) in exchange for the HSSs voting against the Union.

While Wilson made no express promise to take any specific action to improve relations between management and the HSSs, again viewing Wilson’s statement “from the standpoint of employees over whom the employer has a measure of economic power,” and the “necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear,” I find Wilson’s “mending fences” remark, made just one day before the election, strongly implied that improved relations might be contemplated if the HSSs voted against the Union.

Citing several Federal Court of Appeals decisions,⁷⁷ Respondent contends that, even if the HSSs mistook the “mending fences” comment as a threat, the statement was repudiated by Gislason when he clarified Wilson’s statement.⁷⁸ However, the key element in the cases cited by Respondent was the fact that the employer did not follow through with the alleged threatening conduct. Here, however, Respondent followed through on the alleged threats – to wit, after the HSSs’ voted for the Union, Respondent did not “mend fences” with the HSSs, rather it removed certain duties from them, changed their schedules and work hours and ultimately, reassigned them to other lower paying positions. Thus, I do not find that Respondent repudiated the alleged threats, it implemented them. Accordingly, I conclude Respondent violated Section 8(a)(1) of the Act by its implied promise of benefit (to “mend fences” with the HSSs) if they voted against the Union.

Finally, with regard to the January 19, 2012 Gislason meeting, I find sufficient evidence to conclude Respondent made the threats of reprisals against the HSSs at this meeting. Specifically, I find that Gislason met with the HSSs after the January 19 Stumbo meeting and told them that management intended to follow through on their threats and Respondent intended to make their decision to join the Union as undesirable as possible to prevent other HSSs at other facilities from unionizing.

Respondent argues that the HSSs are less than fully credible regarding the Gislason meeting. In this regard, Respondent asserts that the HSSs’ claims regarding Gislason threats are suspicious because the HSSs waited six months (until July 2012) after the threats were allegedly made (January 19, 2012) before raising the issue with Respondent. Moreover, Respondent notes that the HSSs signed a handwritten letter dated January 19, 2012 but none of them could precisely recall what happened to the letter, with whom in the Union did they speak about the threats, or the date they gave the letter to the Union. Because of this, Respondent infers that the Gislason threats/meeting never occurred; rather the HSSs’ manufactured the Gislason threats/meeting to support a timely unfair labor practice charge (ULP) in this case.

While Respondent’s argument is certainly interesting, it offered no evidence to support its assertions. As such, I agree with the CGC that “Respondent’s theory is just that, a theory, highly speculative and unsubstantiated.”⁷⁹ In fact, I could posit equally speculative and unsubstantiated theories for the delay in raising the Gislason threats – i.e., that the Union was unaware of the alleged threats until

⁷⁷ See *Cooper Tire & Rubber Co. v. NLRB*, 156 Fed.Appx. 760, 767 (2005), *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1430 (2d Cir. 1996) and *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 276 (8th Cir. 1979).

⁷⁸ *Cooper Tire*, 156 Fed.Appx at 767 (employer’s statement that would reasonably be viewed as an objectionable threat may be cured if employer gives employees a “clear assurance” that it will behave lawfully and will not follow through with the conduct threatened earlier); *Kinney Drugs, Inc.*, 74 F.3d at 1430 (conduct repudiating a threat must be “timely, unambiguous, specific in nature to the coercive conduct and free from other proscribed illegal conduct”), *NLRB v. Intertherm*, 586 F.2d at 276 (explanation and retraction of unlawful threat two days prior cured the unlawful threat).

⁷⁹ GC Br. at 37.

immediately prior to beginning negotiations with Respondent; or that the Union deliberately withheld the fact that they knew about the Gislason threats to afford them a better tactical advantage during negotiations. I could go on *ad nauseum*, but the bottom line is, without additional evidence, that I am not persuaded by Respondent’s assertions in this regard.

Despite the fact that I was not overly impressed with the HSSs’ testimony regarding the specifics on reporting the Gislason threats, I am persuaded by the CGC’s argument that the Board affords current employees’ testimony enhanced reliability when they testify while management representatives are present.⁸⁰ As the Board has long recognized, testifying against an employee’s pecuniary interest is “a risk not lightly undertaken.”⁸¹ For that reason alone, I credit the HSSs’ version of the Gislason meeting over the testimony of Respondent’s witnesses. Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act when Gislason told the HSSs that Respondent intended to follow through with its threats (i.e., to remove certain “supervisory” duties from the HSSs and adjust/cut their schedules, work hours and overtime) in order to dissuade them and other HSSs from voting for the Union.

B. Bargained in Bad Faith

1. Parties’ Positions

Next, I turn to the question of whether Respondent failed to bargain in good faith with the Union in violation of Section 8(a)(5) by offering discriminatory proposals which evinced no intent to reach an agreement. Specifically, in Complaint paragraphs 11(b) and (c), the CGC alleges that Respondent bargained in bad faith by advancing proposals, where the content of its proposals were not based upon legitimate business justifications, rather, were designed to never reach an agreement and retaliate against the HSSs for voting for the Union. Respondent maintains that it bargained in good faith because it formulated and advanced proposals based upon legitimate business justifications, and when no agreement was reached, lawfully declared a good faith impasse.

2. Prevailing Legal Authority

Section 8(a)(5) and 8(d) of the Act defines the obligation of employers to bargain collectively as the “obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” The obligation to bargain in good faith “does not compel either party to agree to a proposal or require the making of a concession.”⁸² In fact, a party is “not required to make concessions or to yield any position fairly maintained,” but a party who enters into negotiations with a predetermined resolve not to budge from an initial position demonstrates “an attitude inconsistent with good-faith bargaining.”⁸³ Thus, a sincere effort to reach common ground is the essence of good-faith bargaining.⁸⁴

To determine whether a party, in this case, the employer, bargained in good faith, the trier of fact must examine the totality of the circumstances, including, at times, the substantive terms of the employer’s proposals, because “[s]ometimes, especially if the parties are sophisticated, the only indicia of

⁸⁰ See *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978) (“the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest.”)

⁸¹ See *Comcast Cablevision*, 313 NLRB 220, 224 (1993) (and cases cited therein).

⁸² See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970)(quoting *NLRB v. American Insurance Co.*, 343 U.S. 395, 404 (1952)).

⁸³ See *Gen. Elec. Co.*, 150 NLRB 192, 196 (1964), *enfd.* 418 F.2d 7736 (2d Cir. 1969), *discussed in Am. Meat Packing Co.*, 301 NLRB 835 (1991).

⁸⁴ *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir.1943).

bad faith may be the proposals advanced and adhered to.”⁸⁵ In assessing the employer’s proposals, the trier of fact must not “sit in judgment upon the substantive terms of collective bargaining agreements,”⁸⁶ however “[r]igid adherence to disadvantageous proposals may provide a basis for inferring bad faith.”⁸⁷ Overall, the trier of fact must consider the context of the employer’s total conduct, “both at and away from the bargaining table. Relevant factors include: unreasonable bargaining demands, delaying tactics, efforts to bypass the bargaining representative, failure to provide relevant information, and unlawful conduct away from the bargaining table,”⁸⁸ to decide “whether the employer is engaging in hard but lawful bargaining . . . or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.”⁸⁹

3. Analysis

The CGC’s argument that Respondent engaged in bad faith negotiations is rather complicated. From what I gathered from the CGC’s theory, the CGC avers that Respondent’s bargaining proposals consistently sought to reassign three of its HSSs to lower paying positions in Operations and two other HSSs to a newly created HSC bargaining unit position. Respondent’s business justification for proffering these proposals centered on the fact that once the ARD determined that the HSSs were not supervisors, Respondent was required to reassign/remove certain duties (i.e., Incident Commander/Owner and EMT duties) that were inherently supervisory. Once those duties were removed, the HSSs’ remaining duties no longer justified having all five HSSs work a 24/7 shift schedule. So, Respondent created and reassigned two of its HSSs to the new bargaining unit HSC position and transferred the remaining three HSSs to Operations.

However, the CGC posits that Respondent intentionally misinterpreted the ARD’s Decision to advance its own nefarious motives – to make good on its prior threats of reprisals for the HSSs unionizing. As such, the CGC claims that Respondent’s reasons for advancing its bargaining proposals were not based upon legitimate business justifications; rather served as a pretext to cover up its true retaliatory motive (to punish the HSSs for unionizing and to prevent other HSSs from unionizing). Thus, as the CGC’s theory goes, the advancement of Respondent’s discriminatory proposals is, by itself, sufficient evidence of Respondent’s bad faith intent to “frustrate the possibility of arriving at [an] agreement.”⁹⁰

After viewing the employer’s and its substantive proposals, “both at and away from the bargaining table...[looking at] factors including, [the employer’s] unreasonable bargaining demands, delaying tactics, efforts to bypass the bargaining representative, failure to provide relevant information, and unlawful conduct away from the bargaining table,”⁹¹ I conclude that the totality of Respondent’s conduct evinced an intent never to reach agreement with the Union sufficient to constitute bad faith “surface bargaining” in violation of Section 8(a)(5).

⁸⁵ *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 609 (7th Cir. 1979).

⁸⁶ *NLRB v. Am. National Insurance Co.*, 343 U.S. 395, 404 (1952).

⁸⁷ *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187, 1188 (D.C.Cir.1981) (emphasis added). See generally 29 U.S.C. § 158(d). See also *Borden, Inc. v. NLRB*, 19 F.3d 502, 512 (10th Cir. 1994) (noting also that “rigid adherence to disadvantageous proposals may provide a basis for inferring bad faith”).

⁸⁸ See *Hardesty Co.*, 336 NLRB No 18, slip op. at 3 (2001) (citing *Atlanta Hilton & Tower*, 271 NLRB 1600 (1974); *NLRB v. Stanislaus Implement & Hardware Co.*, 226 F.2d 377 (9th Cir. 1955); and *NLRB v. Arkansas Rice Growers Assn.*, 400 F.2d 565, 572 (8th Cir. 1968).

⁸⁹ *Public. Service. Co. of Oklahoma.*, 334 NLRB 487 (2001) (quoting *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)), *enfd.* 318 F.3d 1173 (10th Cir. 2003).

⁹⁰ GC Br. at 49–50.

⁹¹ See *Hardesty Co.*, *supra* at n.165.

First, I find sufficient evidence in the record to conclude that Respondent operated with a closed mind by insisting on a proposal that it knew (or should have known) was not based upon legitimate business justifications. The evidence reveals that, from May through November 2012, Respondent never moved from its original proposal to reassign the HSSs into other bargaining unit positions based, primarily, on its own inaccurate interpretation of the ARD’s Decision that the HSSs (and their duties) were not supervisory in nature. Respondent asserts that, based upon the ARD’s Decision, it was required to remove certain duties from the HSSs, primarily the Incident Commander/Owner and EMT functions, because they were “inherently supervisory in nature.” Unfortunately, the evidence shows the exact opposite.

Rather, the ARD concluded that the HSSs were not supervisors based upon the Incident Commander/Owner and EMT duties.⁹² In fact, Respondent’s own written policies undermine its claim that the HSSs are supervisors when serving as Incident Commander/Owner. Specifically, the ARD found, and Respondent’s policies dictate that the HSSs assume the Incident Command role only during the initial stages of an emergency; thereafter, an Advance Response Incident Commander (i.e., a supervisor) takes control of the emergency.⁹³ Additionally, the evidence shows that, even while serving as the Incident Owner, the HSSs are supervised by a “Responsible Supervisor” who works closely with the HSSs to document the incident and oversee the investigation.⁹⁴

Similarly, while Respondent avers that, without the Incident Command/Owner functions, Respondent had no business need to maintain five HSSs on a rotating 24/7 schedule, the evidence, in fact, negates Respondent’s business necessity for removing these duties from the HSSs. Moreover, despite Respondent’s belief that HSSs served as supervisors during disciplinary meetings, record evidence failed to show even one occasion where the HSSs served in that capacity and that role was not listed in their position description.

Respondent’s asserted business reason for contracting out the HSSs’ EMT duties also does not withstand scrutiny. Here, Respondent claims that the EMT duties were not a necessary function for the HSSs, and as such, it was free to contract those duties to a third party. However, Respondent’s own literature indicates that the HSSs were required to have an “EMT Certification or the ability to acquire certification within 30 days.”⁹⁵ While Respondent claims that other employees were also certified to perform EMT duties, Respondent failed to sufficiently explain why it was required to reassign those duties in light of the ARD’s determination.

Respondent further argued that it maintained the exclusive right to assign/reassign duties upon which it was not required to bargain. However, the parties’ collective bargaining agreement (CBA) excluded the HSSs from that management prerogative. Even assuming the HSSs were technically bargaining unit employees, and as such, Respondent was privileged to reassign the EMT duties, Respondent admitted at the hearing that the EMT duties were not inherently supervisory. Thus, again, Respondent failed to offer an explanation as to why it was required to remove the EMT duties from the HSSs when the evidence shows it had no business need for doing so.

The fact remains that Respondent insisted upon its proposals and business rationale despite the ARD’s determination which nullified its business justification. Even when the Union challenged Respondent’s business justification with the ARD’s rationale, and presented it with a copy of the ARD’s

⁹² GC Exh 13.

⁹³ GC Exh. 57.

⁹⁴ Id.

⁹⁵ GC Exh. 2.

Decision during negotiations, Respondent never reviewed it. In fact, Respondent’s witnesses admitted that they never actually read the ARD’s rationale that certain of the HSSs duties were not inherently supervisory.

Furthermore, because Respondent maintained that its HSSs perform duties that are inherently supervisory, when the ARD previously determined they did not, I find that Respondent is essentially unlawfully relitigating issues previously decided by the Board in the underlying representation hearing.⁹⁶ Accordingly, I find that Respondent’s unreasonable bargaining demands, even in the face of the ARD’s determinations to the contrary, sufficient to prove it bargained in bad faith.

Second, I find that Respondent operated with a closed mind by advancing proposals that, I conclude, were merely extensions of its pre-election threats against the HSSs. Respondent notes that the Regional Director for Region 31 previously dismissed a prior ULP charge, finding that Respondent bargained in good faith with the Union because it provided a “good faith explanation in support of its proposal . . . an opportunity to respond to the proposal . . . and a legitimate business justification in making its proposal.”⁹⁷ However, I am not bound by this determination.⁹⁸ In fact, record evidence developed at the hearing (as set forth above) reveals no legitimate business justification for the proposals advanced by Respondent.

Moreover, although the Regional Director found no causal link between the alleged “coercive pre-election statements” and the “lawful, hard bargaining demonstrate by [Respondent],” I disagree. Rather, I find, and the credited testimony at hearing proves that the HSSs were threatened with *specific* adverse consequences (i.e., reassigned duties, cut work hours/schedules/overtime) if they unionized; they were again forewarned that those *specific* reprisals (i.e., reassigned duties, cut work hours/schedules/overtime) would occur if they unionized, and as soon as the HSSs unionized, Respondent advanced proposals that mirrored those *specific* adverse consequences (i.e., reassigned duties, cut work hours/schedules/overtime). In addition, the record clearly demonstrates Respondent’s strong preference that the HSSs not unionize and the HSSs were made aware of that fact when the coercive threats were made. Taken together, I believe a sufficient nexus exists to reasonably infer that Respondent’s proposals served as extensions of their pre-election threats.

The CGC argues that Respondent was motivated by its anti-union animus (i.e., retaliation for the HSSs having unionized) in advancing its proposals, and that, by itself, is sufficient to show bad faith. However, I cannot go as far as the CGC on this point. The record certainly demonstrates Respondent’s anti-union preference as evidenced by Wilson’s statements to the HSSs to that effect. In addition, Respondent’s situation with the Alliance HSSs, where Respondent reassigned those HSSs into other lower paying bargaining unit positions after they unionized, raises strong suspicions in my mind regarding Respondent’s overall anti-union sentiment.

Yet, I am nevertheless reluctant to find, absent Board precedent, that Respondent’s anti-union animus, standing alone, is sufficient to infer bad faith. Rather, I do find that, given the nexus between the content of the threats and the content of Respondent’s proposals, sufficient evidence exists to conclude that Respondent’s proposals served as extensions of their pre-election threats which, *along with other evidence described in this decision*, evinces an intent to bargain in bad faith.

⁹⁶ See *Gross School Bus Service*, 356 NLRB No. 81 (2011), citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941) (cannot relitigate representation cases in unfair labor practice case).

⁹⁷ R. Exh. 5.

⁹⁸ See *Kelly’s Private Car Service*, 289 NLRB 30, 39 (1998), *enfd.* sub nom. 919 F.2d 839 (2d Cir. 1990) (“it is well settled that the dismissal of a prior charge by a Regional Director, even where the identical conduct is involved, does not constitute an adjudication on the merits, and no *res judicata* effect can be given to those actions.”).

Respondent's conduct immediately prior to negotiations fails to persuade me that it acted in good faith. Here, Respondent claims that, prior to the start of official negotiations, it: (1) provided assurances to the Union that the "focus" of the new bargaining unit position would remain health and safety, (2) agreed not to lay off any of the HSSs as a result of the collective bargaining process, and (3) agreed to a specific hourly wage rate for the new job classification. Although Respondent is correct regarding its prenegotiation conduct, I am required to look at the totality of Respondent's conduct to determine whether it harbored an intent to reach an agreement/bargain in good faith. As set forth above, the record contains other evidence of Respondent's bad faith.

Citing the Board's decision in *In John S. Swift Co.*, Respondent next claims it maintained an open mind during negotiations because it: (1) agreed to the parties' ground rules for negotiations, (2) paid the HSSs who participated in the negotiation sessions, (3) agreed that if any of the HSSs were ultimately displaced, displacement would be based on seniority, (4) approved a salary increase for the HSSs even though, at the time, they were no longer "management" employees, and (5) considered additional duties suggested by Garcia to determine if Respondent could support the HSSs 24/7 shift schedule.⁹⁹ However, none of the items identified by Respondent were major subjects of bargaining which the Board considered in *In John S. Swift Co.* to determine if the employer engaged in good-faith bargaining. That fact alone distinguishes *In John S. Swift Co.* from the present case.¹⁰⁰

Lastly, while Respondent points out that it met with the Union 11 times between May and November 2012, the quantity or length of bargaining sessions does not establish or equate with good-faith bargaining.¹⁰¹

Overall, I conclude that Respondent's "[r]igid adherence to disadvantageous proposals" particularly when those proposals were not based on legitimate business justifications but rather served as extensions of Respondent's unlawful threats, provide sufficient basis for me to infer bad faith.¹⁰² Even when the basis of Respondent's business rationale proved untenable, the evidence shows that Respondent insisted on proffering bargaining proposals based on its unreasonable interpretation of the ARD's findings. Coupled with evidence showing that its proposals served as extensions of its pre-election threats together with evidence of anti-union animus, I find the record shows that Respondent "enter[ed] into negotiations with a pre-determined resolve not to budge from an initial position [which] demonstrates 'an attitude inconsistent with good-faith bargaining.'" ¹⁰³ Accordingly, I find the totality of Respondent's conduct during negotiations evinced an intent never to reach agreement with the Union sufficient to constitute bad faith "surface bargaining" in violation of Section 8(a)(5).

Finally, I conclude that Respondent failed to bargain in good faith with the Union when it unlawfully declared an impasse.

An employer may declare an impasse when "good faith negotiations have exhausted the prospects of concluding an agreement" such that further bargaining would be futile.¹⁰⁴ Once this point is reached, an employer does not violate the Act by making unilateral changes that are reasonably comprehended

⁹⁹ *In John S. Swift Co.*, 124 NLRB 394 (1959).

¹⁰⁰ *Id.*

¹⁰¹ *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952).

¹⁰² *NLRB v. Blevins Popcorn Co.*, 659 F.2d at 1187–1188.

¹⁰³ See *Gen. Elec. Co.*, 150 NLRB 192, 196 (1964), *enfd.* 418 F.2d 7736 (2d Cir. 1969), *discussed in Am. Meat Packing Co.*, 301 NLRB 835 (1991).

¹⁰⁴ *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

within his pre-impasse proposals.¹⁰⁵ However, an employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally declares impasse and institutes changes in existing terms and conditions of employment.¹⁰⁶ Moreover, if unremedied unfair labor practices exist, “a lawful impasse cannot be reached” and the employer “cannot unilaterally implement its last offer” in the course of bargaining leading up to the declaration of impasse.¹⁰⁷

In *Titan Tire Corp.*, the Board dealt with a situation almost identical to the facts in this case. In that case, the company and the Union held several negotiating sessions in an effort to reach an agreement on a successor contract at the company’s Des Moines, Iowa facility. The parties failed to reach an agreement prior to the expiration of the contract, so the Union began a strike. During this time, the company’s chairman held a press conference with employees. At the conference, the chairman told employees that the company would move its equipment from Des Moines to Brownsville, Texas which “would be irreversible . . . if there was no settlement” with the Union. It was undisputed that moving the company’s equipment would reduce the number of employees at the Des Moines facility from 650 to 300.

Meanwhile, after several negotiating sessions, the company notified the Union that it submitted and, subsequently implemented its last, best and final offer. The employer argued that the parties were at a bargaining impasse and, therefore, its implementation action did not violate the Act.

However, the Board, agreeing with the judge, concluded that the company’s statements about relocating equipment and jobs from Des Moines to Brownsville were threats in violation of Section 8(a)(1). Moreover, because of these threats, the unremedied unfair labor practices the employer committed prevented the parties from reaching an agreement because “[the chairman’s] . . . threats to move equipment from, and reduce bargaining unit jobs at, the Des Moines plant substantially undercut the Union’s position at the negotiating table on an issue that was of high priority to the bargaining unit,” i.e., restoring jobs.¹⁰⁸ As such, the Union was forced to bargain about restoring versus protecting unit jobs, which “put additional pressure on the bargaining committee to ‘rectify the wrong.’” Therefore, the Board found that no good faith impasse could be reached, and the company violated Section 8(a)(5) by unilaterally implementing its final offer, because the company’s unlawful conduct/unfair labor practices “contributed to the parties’ inability to reach agreement.”¹⁰⁹

Like in *Titan Tire*, Respondent threatened to cut the HSSs’ duties, work hours and schedules if they voted to join the Union. I previously found these statements were coercive pre-election threats violative of Section 8(a)(1). However, after the HSSs unionized, Respondent proffered proposals that mirrored their pre-election threats. Thus, the Union was forced to bargain over restoring versus protecting the HSSs’ jobs. As such, when Respondent, after several negotiating sessions, unilaterally implemented its final proposal (that in effect implemented its prior threats), I find that Respondent failed to bargain to a good faith impasse because their unlawful conduct “contributed to the parties’ inability to reach an agreement.”¹¹⁰

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See *Titan Tire Corp.*, 333 NLRB 1156, 1158 (2001) (lawful impasse cannot be reached in the presence of unremedied unfair labor practices and the employer “cannot ‘parlay an impasse resulting from its own misconduct into a license to make unilateral changes’”).

¹⁰⁸ *Id.* at 1159.

¹⁰⁹ *Id.*

¹¹⁰ *Titan Tire*, 333 NLRB 1156 at 1159.

Respondent nevertheless argues that a lawfully impasse was reached since neither party moved from their original positions after 12 negotiation sessions over a seven-month period.¹¹¹ Here, Respondent notes that the Union never moved from its position that all five HSSs should maintain all of their duties on a 24/7 shift schedule, and Respondent never moved from its position to reassign two HSSs to a newly created HSC bargaining unit position and transfer the remaining three HSSs into Operations. In addition, Respondent cites to a myriad of Board and District of Columbia Circuit cases for the proposition that a party's disagreement on any single key issue is sufficient to support a lawful impasse.¹¹² However, all of the cases cited by Respondent are distinguishable from Respondent's circumstance, because Respondent's unlawful proposals in this case "contributed to the parties' inability to reach an agreement."¹¹³ Thus, even if the Union maintained its original position, Respondent's conduct "demonstrat[ed] an unwillingness to compromise further," sufficient to find that no good faith impasse could have occurred.¹¹⁴ Accordingly, Respondent violated Section 8(a)(5) when it failed to bargain in good faith with the Union to a lawfully declared impasse.

C. Respondent Retaliated Against the HSSs by Unilaterally Implementing its Final Offer

Next, I turn to the question of whether Respondent violated Section 8(a)(3) of the Act when it unilaterally implemented its final offer in the absence of a lawful impasse. In so doing, Respondent reassigned Senes and Garcia to lower paying HSC bargaining unit positions and transferred Gallizio, Lanier, and McNeil into lower paying Operator 1 positions. Based upon the evidence, I find the violations alleged.

1. Parties' Positions

The CGC argues that Respondent violated Section 8(a)(3) of the Act by implementing its final proposal containing adverse terms and conditions of employment in retaliation for the HSSs unionizing. Respondent counters by arguing it never discriminated against the HSSs based upon their protected concerted activity (i.e., unionizing); rather it simply implemented its last, best and final offer, based on legitimate business need, after lawfully declaring impasse.

2. Prevailing Legal Authority

An employer violates Section 8(a)(3) of the Act by implementing adverse terms and conditions of employment in retaliation for its employees exercising their Section 7 rights.¹¹⁵ In order to establish discriminatory retaliation under Section 8(a)(3), the General Counsel must show that the HSSs' protected activity (unionizing) was a substantial or motivating factor for the adverse action taken by Respondent. Respondent, then, must show that it would have taken the same action even in the absence of the HSSs' protected activity.¹¹⁶ Although the General Counsel carries the ultimate burden to prove that the employer's anti-union animus was a "substantial or motivating factor" in Respondent's decision to

¹¹¹ While Respondent claims the parties bargained over an 11-month period, the parties essentially bargained over a seven month period from May through November 2012.

¹¹² See *CalMat*, 331 NLRB 1084, 1098 (2000), *Erie Brush Mfg Corp. v. NLRB*, 700 F.3d 17, 21–23 (D.C. Cir. 2012) (impasse demonstrated based on lack of agreement over two issues regarding union security and arbitration), see also R. Br. at 37–38.

¹¹³ See *Titan Tire Corp.*, supra at n.189.

¹¹⁴ See *Tru-Serve Corp. v. NLRB*, 254 F.3d 1105, 1117 (D.C. Cir. 2001), *American Federation of Television and Radio Artists v. NLRB*, 395 F.2d 622, 627 (D.C. Cir. 1968).

¹¹⁵ See *Williamette Industries*, 341 NLRB 560, 562–563 (2004) (finding 8(a)(3) violation where employer changed employee shift schedules and reduced overtime in retaliation for employees electing union).

¹¹⁶ See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

implement the adverse action, the presence of prior unfair labor practices committed by the employer,¹¹⁷ statements by management officials evincing a discriminatory intent,¹¹⁸ and findings that an employer's proffered reasons for the disparate terms are a pretext¹¹⁹ are factors which demonstrate the employer's anti-union motive.

3. Analysis

In this case, I find sufficient evidence that Respondent reassigned the HSSs to lower paying bargaining unit positions in response to their protected concerted activity. For Respondent's showing, it maintains it unilaterally implemented its final proposal after a good faith impasse in negotiations occurred between Respondent and the Union. However, I have previously found Respondent unlawfully declared impasse based upon bad faith negotiations.¹²⁰ Respondent further maintains that it implemented its final offer based upon its legitimate business rationale for the proposals it advanced during negotiations. However, again, I have previously rejected this argument.

Respondent points to Wilson's, Gislason's, and Stumbo's testimony where they deny that the proposals advanced were motivated in any way by anti-union sentiment. However, I have previously found their testimony incredible on this point. In fact, Wilson admitted that she told the HSSs that "management" preferred that they vote against the Union, and I credit the HSSs' testimony that Gislason told them that "management" intended to implement its pre-election threats and make their vote as undesirable as possible to discourage them from unionizing. In addition, I find credible evidence of Wilson's anti-union animus when she promised that management would "mend fences" with the HSSs if they voted against the Union.

Also contrary to Respondent's arguments, I find ample evidence in the record to support that Respondent's proposals were motivated by anti-union animus. First, as discussed in detail earlier in this decision, Respondent's proposals throughout bargaining mirrored its pre-election threats to eliminate job functions, reduce shift work and overtime, and reassign their EMT duties if the HSSs unionized. Moreover, the HSSs were warned that if they voted for the Union, not only would Respondent make their decision as undesirable as possible but it threatened to remove certain of their duties, change their schedules and cut their work hours if they voted for the Union. In fact, that is exactly what happened after the HSSs unionized.

Similarly, Respondent essentially admitted that the unionization of the HSSs was the sole reason for advancing its bargaining proposals. Specifically, in its October 26, 2012 letter to the Union, Respondent told the Union that the changes Respondent sought to make to the HSSs' employment terms was the "legitimate and logical consequences" of their choice to join the Union.¹²¹ In other words, the necessity to reassign them to bargaining unit positions would not have occurred but for their vote to join the Union. Although Respondent may have meant that it was implementing its final proposal since the parties could not agree on the employment terms now that the HSSs chose to unionize and were bargaining unit employees, this fact was already known to the parties at the time. As such, I query the need to insert the language in the letter in the first place. Rather, because I have previously found

¹¹⁷ *Williamette Industries*, supra at n.189.

¹¹⁸ See *Peabody Coal Co.*, 265 NLRB 93, 99–100(1982)(8(a)(3) violation exists where employer with history of 8(a)(1) conduct told employees that new benefits were withheld because they were "trying to get into the union"), enfd in relevant part 725 F.2d 357, 366 (6th Cir. 1984).

¹¹⁹ See *Phelps Dodge Mining Co.*, 308 NLRB 985, 996–997 (1982) (citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)).

¹²⁰ See *Titan Tire Corp.*, supra at n.189.

¹²¹ GC Exh. 56.

Respondent’s business rationale for its proposals unfounded, Respondent’s letter is indicative of its antipathy against the HSSs for unionizing.

Respondent asserts that it held no union antipathy in advancing its proposals regarding the Santa Maria HSSs because it is accustomed to working with the Union at its other larger, California refineries. According to Respondent, it could not have held any anti-union animus against the five Santa Maria HSSs for unionizing because including them into the bargaining unit, when it has over 3,000 unionized employees, would not warrant a “full-scale campaign to ‘punish’ and ‘make an example’ of the HSSs. While Respondent’s facilities nationwide employ over 3,000 unionized employees, the credited testimony reveals that Respondent wanted to prevent the *HSSs*, both at Santa Maria and other refineries, from unionizing. In fact, the evidence reveals that, after the HSSs at the Alliance refinery unionized, their duties were reassigned, schedules cut, and ultimately, they were transferred into other bargaining unit positions.

Moreover, the fact that Respondent held a long standing relationship working with the Union fails to negate that Respondent resisted the *HSSs*’ effort to unionize. Finally, as discussed above in Section B, I find that Respondent’s rationale for its business justification in advancing its proposals was pretextual as it was not based on a legitimate business need.

Therefore, based on the foregoing, I find sufficient evidence to conclude that Respondent’s anti-union animus toward the HSSs unionizing was the motivating factor in its decision to insist on and implement its final proposal. In so doing, Respondent violated Section 8(a)(3).

D. News Media Guidelines

Finally, I turn to the question of whether Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing its news media policy.

1. Parties’ Positions

Citing the Board’s decision in *Crowne Plaza Hotel*, 352 NLRB 382 (2008), the CGC argues that Respondent’s news media policy violates Section 8(a)(1) of the Act because it could reasonably be interpreted as prohibiting employees in exercising their Section 7 rights. Respondent maintains that the policy: (1) does not expressly prohibit union activity; (2) cannot reasonably be interpreted to prohibit employees from discussing their terms or working conditions, and/or (3) serves clear legitimate business purposes.

2. Prevailing Legal Authority

In *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 n. 14 (2004), the Board noted that the ability to discuss terms and conditions of employment with fellow employees is the most basic of Section 7 rights. Thus, it is well settled that employees have a protected right to discuss and to distribute information regarding wages, hours, and other terms and conditions of employment.¹²² Because of these inherent protections, the Board has scrutinized employer work rules that restrict employees’ Section 7 rights.

The Board set out a framework for evaluating whether an employer’s work rule, such as Respondent’s news media policy, violates the Act. First, the rule must be examined to determine whether

¹²² *Mobile Exploration & Producing U.S., Inc.*, 323 NLRB 1064, 1068 (1997), enf’d. 156 F.3d 182 (5th Cir. 1998).

it explicitly restricts Section 7 activity. If it does, the rule is unlawful.¹²³ If the rule does not explicitly restrict Section 7 activity, the rule must be evaluated to determine whether: (1) employees would reasonably construe the language in the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. If any of these circumstances apply, the rule infringes on employees' rights under the Act.¹²⁴

3. Analysis.

Respondent's news media guideline states that, if employees are contacted by the media, "no information exchange is permitted concerning Santa Maria or Rodeo Refinery operations." Employees are informed that it is "against company policy for anyone but an authorized company spokespersons (sic) to speak to the news media." The CGC argues that this language violates the Act because, absent clarification, employees could reasonably construe these guidelines to prohibit them from discussing labor disputes, wages, or other terms and conditions of their employment. I agree.

In *Crowne Plaza Hotel*, 352 NLRB 382 (2008), the Board dealt with language in an employer's news media policy similar to that found in this case. In *Crowne Plaza Hotel*, the company's news media rule prohibited employees other than the General Manager or a designated representative from discussing "any incident that generates significant public interest or press inquiries."¹²⁵ The employer argued that it maintained this policy to impress upon employees that only the General Manager may speak on its behalf and give the company's "official comment" regarding media inquiries.

In finding the policy unlawful, however, the Board determined that the terms "any incident" and "significant public interest" were overly broad to reasonably encompass and restrict communications concerning labor disputes.¹²⁶ Moreover, the Board found that, because the rule was so broadly worded, the rule not only prohibited employee communication with the media when the media sought the employer's "official comments," but could be construed to prevent *all* employee communications with the media regarding a labor dispute; thus, was susceptible to the reasonable interpretation that it barred Section 7 activity.¹²⁷

Like in *Crowne Plaza Hotel*, Respondent argues that its news media guideline was intended to prohibit employees, other than a designated spokesperson, from speaking to the media on its behalf about confidential company operations (i.e., recent supply and demand issues in California and the resulting price increases). However, Respondent's news media guideline suffers the same deficits as the policy in *Crowne Plaza Hotel*. Specifically, because Respondent's ambiguous rule prohibits all "information exchange" about "company operations," and those terms are ill defined, the guideline, as written, could also encompass and prohibit communications about "wages," "labor disputes," and other terms and conditions of employment.¹²⁸ Because Respondent's guideline fails to define its terms so as to clarify what communication is permissible, I find that Respondent's rule reasonably tends to chill protected activity.¹²⁹ Accordingly, Respondent's news media guideline violates Section 8(a)(1) of the Act.

¹²³ *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999), and *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

¹²⁴ *Lutheran Heritage*, *supra*.

¹²⁵ *Crowne Plaza Hotel*, 352 NLRB 382, 385–386 (2008).

¹²⁶ *Id.* at 386.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *Trump Marina Casino Resort*, 355 NLRB 585, slip op. at 1 (2010) (Board found employer's rule which prohibited employees from releasing statements to news media without prior approval and authorized only certain representatives to speak with the media was unlawfully overbroad and could reasonably be construed to restrict Sec. 7 activity).

CONCLUSIONS OF LAW

5 1. Respondent Phillips 66 is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by:

10 (a) Making unlawful, impermissible coercive threats to its HSSs on January 16, 2012, that unionization would result in a loss of/changes to certain duties, schedules and work hours.

 (b) Making unlawful threats to its HSSs on January 19, 2012, that impermissibly implied a promise of benefit to the HSSs if they voted against the Union.

15 (c) Promulgating and maintaining an overly broad news media guideline that employees could reasonably understand to prohibit them from speaking to the media about labor disputes, wages, and other terms and conditions of employment.

3. Respondent violated Section 8(a)(5) by:

20 (a) Failing to bargain in good faith with the Union from May through November 2012 when Respondent offered proposals with no intention to reach agreement.

 (b) Failing to bargain in good faith with the Union when Respondent unilaterally declared impasse in negotiations.

25 4. Respondent violated Section 8(a)(3) by:

30 (a) Retaliating against its HSS for unionizing when Respondent unilaterally implemented its final proposal that reassigned two HSSs to the position of Health and Safety Coordinator and demoted the three remaining HSSs to the position of Operator 1.

REMEDY

35 Having found that Respondent has engaged in certain unfair labor practices, I find that the Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

40 The CGC requests remedies in addition to those the Board generally grants for the above violations. The Board has broad discretion to fashion a just remedy to fit the circumstances of each case it confronts.¹³⁰ The Supreme Court has interpreted Section 10(c) as vesting the Board with discretion to devise remedies that effectuate the policies of the Act.¹³¹

45 The complaint requests that the notice to employees of the violations found here be read to its employees at a mandatory meeting during working hours. I decline to grant this enhanced remedy. First, the CGC cites to no Board precedent to support this special remedy. Second, while I find the violations

¹³⁰ *Maramont Corp.*, 317 NLRB 1035, 1037 (1995).

¹³¹ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898–899 (1984).

Respondent committed are serious, they are not “so numerous, pervasive, and outrageous” such that additional remedies are required “to dissipate fully the coercive effects of the unfair labor practices found.”¹³²

The Charging Party Union requests that the notice to employees be mailed or emailed since some employees affected by Respondent’s unlawful conduct no longer work for Respondent. Given that former HSS Steven McNeil was directly affected by Respondent’s unlawful conduct and he no longer works for Respondent, I grant Charging Party’s request.

The complaint also requests an extended bargaining order under *Mar-Jac Poultry*, 136 NLRB 785 (1962). Respondent did not provide argument as to why *Mar-Jac Poultry* should not apply. Because the circumstances of this case present inequities similar to those in *Mar-Jac*, I find it applies and will recommend the requested remedy of a six (6) month extension to bargain with the Union as the recognized bargaining representative in the appropriate unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³³

ORDER

The Respondent, Phillips 66 of Santa Maria, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its former Health and Safety Shift Specialists or any other employee with a loss of/change to their duties, schedules, work hours or any other term or condition of employment if they decide or select to join the Union.

(b) Impliedly promising its former Health and Safety Shift Specialists or any other employee unspecified benefits in exchange for their vote against the Union.

(c) Promulgating, maintaining and/or enforcing an overly broad news media guideline that employees could reasonably understand would prohibit them from exercising their Section 7 rights.

(d) Failing and refusing to bargain in good faith with the Union over the terms and work conditions of the Santa Maria HSSs in the absence of a lawfully declared impasse.

(e) Reassigning employees Lionel Senes, Andrew Garcia, Bernard Gallizio, Allen Lanier, and Steven McNeil or any other employee to lower paying bargaining unit positions because they voted to join the union, or otherwise discriminating against any employee for joining and/or supporting the Union or for engaging in any other protected concerted activity.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

¹³² *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995).

¹³³ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the unit over the former Health and Safety Shift Specialists Senes', Garcia's, Gallizio's, Lanier's, and McNeil's terms and conditions of employment, including their reassignments into lower paying bargaining unit positions.

(b) Within 14 days from the date of the Board's Order, offer full reinstatement to employees Senes, Garcia, Gallizio, Lanier, and McNeil to their former positions as Health and Safety Shift Specialists, or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights and privilege previously enjoyed, and to make employees Senes, Garcia, Gallizio, Lanier, and McNeil whole for any loss of earnings and other benefits suffered as a result of the discrimination against them for exercising their Section 7 rights.¹³⁴ Backpay shall be computed in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)(adopting the Internal Revenue Service rate for underpayment of Federal taxes), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Backpay due each employee should not be reduced by any interim earnings the employees may have generated during the backpay period pursuant to *Community Health Services, Inc. d/b/a Mimbres Memorial Hospital & Nursing Home*, 361 NLRB No. 25 (2014).

(c) Within 14 days from the date of the Board's Order, Respondent shall also be required to remove from its files any and all references to the unlawful reassignment of the affected employees, and, within three (3) days thereafter, notify Senes, Garcia, Gallizio, Lanier, and McNeil in writing that this has been done and that the reassignment will not be used against them in any way.

(d) Rescind or revise its news media guideline to remove any language that prohibits or may be read to prohibit employees from exercising their Section 7 rights.

(e) Furnish, publish and/or distribute, either personally or by mail to all current employees and by mail to all former employees, new news media guidelines that: (1) do not contain the unlawful language, or (2) advises that the unlawful provisions have been rescinded, or (3) provides the language of lawful provisions that describes, with specificity, which types of conduct or communication is proscribed by the Agreement and the conduct/communication that is protected by the Act.

(f) Within 14 days after service by the Region, post at its Santa Maria facility, copies of the attached notice marked "Appendix"¹³⁵ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and former employees by such means. Respondent also shall duplicate and mail, at its expense, a copy of the notice to all former employees who were affected by its unlawful conduct. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, Respondent

¹³⁴ See n.53 in this decision.

¹³⁵ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2011.

5 (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, D.C., November 25, 2014

A handwritten signature in black ink, appearing to read "Lisa D. Thompson". The signature is fluid and cursive, with the first name "Lisa" being more prominent.

15 Lisa D. Thompson
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten any employee with a loss of/change to their duties, schedules, work hours or other terms and conditions of their employment if they select the Union to represent them.

WE WILL NOT impliedly promise anything of benefit to any employee in exchange for voting against being represented by the Union.

WE WILL NOT maintain, promulgate or enforce any news media guideline that employees reasonably would believe bars or restricts them from communicating with the media in exercising their Section 7 rights.

WE WILL NOT refuse to bargain with the Union in good faith or unlawfully and unilaterally declare impasse during negotiations.

WE WILL NOT reassign, transfer or demote employees Lionel Senes, Andrew Garcia, Bernard Gallizio, Allen Lanier, and Steven McNeil or any other employee because of their protected concerted activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise our news media guideline to make it clear to you employees that our media guidelines do not restrict you from communicating with the media in exercising your Section 7 rights.

WE WILL notify employees of the rescinded or revised news media guidelines in writing, including providing you with a copy of any revised guidelines, acknowledgement forms or other related documents, or specific notification that the guidelines have been rescinded.

WE WILL bargain with the Union in good faith over the former Health and Safety Shift Specialists' terms and conditions of work, including their reassignment out of their positions into lower paying bargaining unit positions.

WE WILL reinstate employees Lionel Senes, Andrew Garcia, Bernard Gallizio, Allen Lanier, and Steven McNeil to their former positions as Health and Safety Shift Specialists, or, if that job no longer exists, reinstate them to a substantially equivalent position, without prejudice to their seniority or any other rights and privilege previously enjoyed, and to make employees Senes, Garcia, Gallizio, Lanier, and McNeil whole for any loss of earnings and other benefits suffered as a result of the discrimination against them for exercising their Section 7 rights.

WE WILL reimburse employees Lionel Senes, Andrew Garcia, Bernard Gallizio, Allen Lanier, and Steven McNeil for wages lost resulting from their reassignment to other lower paying bargaining unit positions when they unionized and we unilaterally and unlawfully declared impasse in bargaining with the union and implemented our final proposal effective December 10, 2012.

WE WILL remove or expunge all records of and references to Senes', Garcia's, Gallizio's, Lanier's, and McNeil's reassignment to lower paying bargaining unit positions when they unionized, and we unilaterally and unlawfully declare impasse in bargaining with the Union and implement our final proposal effective December 10, 2012.

PHILLIPS 66

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824
(310) 235-7351, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-085243 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.